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89-1144

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ERNEST E. SARGENT and CYNTHIA L. SARGENT,
Petitioners,

v.

PAINEWEBBER INCORPORATED, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Does an arbitration panel of only three persons exceed its power under 9 U.S.C. § 10(d) of the Federal Arbitration Act in making a lump-sum award after hearing a controversy involving a claim in excess of $500,000.00 where the claimant had agreed to arbitration only under the rules of the New York Stock Exchange ("NYSE"), rule 607 of which requires that five members must sit on the panel in all matters involving non-NYSE members like those here where the amount in controversy is $500,000.00 or more?

2. Is a lump-sum award made by a three person panel ambiguous within 9 U.S.C.§ 10(d) of the Federal Arbitration Act as to whether it was intended to determine both a claim for compensatory damages and one for punitive damages where both claims were presented to the three arbitrators and their award

announced that it was in full and final settlement of the matter, but where the rules of the NYSE under which arbitration was had require controversies involving over $500,000.00 to be heard by five arbitrators, the claim for compensatory damages alone involved less than $500,000.00, but the claims for compensatory damages and punitive damages together exceeded $500,000.00, and where the panel provided no opinion, no record of proceedings, and no computation of damages from which to glean whether the arbitrators intended to determine a controversy involving over $500,000.00 in violation of NYSE rules?

LIST OF PARTIES

The parties to the proceedings below were the petitioners Ernest E. Sargent and Cynthia L. Sargent and respondents PaineWebber Incorporated, formerly known as Paine Webber,

Jackson & Curtis, Inc., and its employees Kevin Greenan, Bruce Edgington, C. Jordan Ball and Joan Doyle.

The respondents before this Court include PaineWebber Incorporated and Kevin Greenan.

TABLE OF CONTENTS

	Page
Questions Presented	1
List of Parties	2
Opinions Below	9
Jurisdiction	9
Statute Involved	11
Statement of the Case	12
Reasons for Granting the Writ	27
I. The first impression decision by the District of Columbia Circuit professedly adopting the Second Circuit's rule accepting lump-sum arbitration awards without explanation of grounds therefor (a) extends that rule beyond the Second Circuit's limits to include cases where no record of proceedings or damage calculation is available from which the grounds for or the meaning of the bare award may be gleaned, (b) conflicts with decisions of other Circuits as well and (c) overlooks strong indications that the arbitrators exceeded their powers.....	27

II. The three person panel exceeded its powers in determining a controversy involving in excess of $500,000.00 in violation of New York Stock Exchange arbitration rules. The guidance given by the Court's decision is that judicial review of lump-sum arbitration awards is effectively abolished even as to clear exceeding of arbitral power where the arbitrators provide no record of any sort, no opinion, and no information on their method of computation of the award from which might be gleaned either support for the award or indications that they exceeded their powers.... 39

III. This case raises important, unresolved problems of lack of clarity of some lump-sum awards made without an arbitration record of any sort to explain their meaning. 43

Conclusion 48

Appendix (Opinion and Judgment of Court of Appeals, two Memorandum Decisions of District Court, and two versions of New York Stock Exchange Rule 607) 50

TABLE OF AUTHORITIES

Cases: Pages

Cleveland Paper Handlers and Sheet Straighteners Union v. E.W. Scripps Co., 681 F.2d 457 (6th Cir. 1982)..... 37

Galt v. Libby-Owens-Ford Glass Co., 397 F.2d 439 (7th Cir. 1968)..... 38

Koch Oil, S.A. v. Transocean Gulf Oil Co., 751 F.2d 551 (2d Cir. 1985)..... 25,28,33

NF & M Corp. v. United Steelworkers of America, 524 F.2d 756 (3d Cir. 1975)..... 36

Oil Chemical & Atomic Workers Int'l. Union v. Rohm & Haas Texas, Inc., 677 F.2d 492 (5th Cir. 1982)..... 37

Olympia & York Florida Equity Corp. v. Gould, 776 F.2d 42 (2d Cir. 1985)..... 32

Shearson/American Express v. McMahon, ___ U.S. ____. 107 S. Ct. 2332 (1987)..... 36

Shearson Loeb Rhoades, Inc. v. Much, C.A. No. 81-4225 (N.D. Ill., Jan 3, 1983), 754 F.2d 773 (7th Cir. 1985)..... 38

Siegel v. Titan Industrial Corp., 779 F. 2d 891 (2d Cir. 1985)..... 31

Sobel v. Hertz, 469 F. 2d 1211 (2d Cir. 1972)..... 23,27,28,29

Wilko v. Swan, 346 U.S. 427 (1953)..... 34,43

Statutes:

Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982)..... 10

9 U.S.C. § 10(d)..... 10,11,25,41,42

Miscellaneous:

Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce on H.R. 4960, The "Securities Arbitration Reform Act of 1988" (proposed), 100th Cong., 2d Sess. (1988)..... 44,45,47,48

Rule 607, Designation of Number of Arbitrators, Arbitration Rules of New York Stock Exchange..... 15-17,40,41

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ERNEST E. SARGENT and CYNTHIA L. SARGENT,
Petitioners

v.

PAINE WEBBER INCORPORATED and KEVIN GREENAN,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

Petitioners Ernest E. Sargent and Cynthia L. Sargent respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled proceeding on August 15, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 737 F.2d 246, and is reprinted in the appendix hereto p. 1a infra.

The memorandum decision of the United States District Court for the District of Columbia (Parker, B.J.) of December 8, 1987 is reported at 674 F. Supp. 920. That Court's memorandum decision of May 10, 1988 denying reconsideration has not been reported. Both are reprinted in the appendix hereto, p. 21a infra.

JURISDICTION

Invoking jurisdiction under 28 U.S.C. §1332, petitioners brought this suit in the District of Columbia. On October 31, 1984 the District Court dismissed the action without prejudice, allowing petitioners to seek appropriate judicial relief following completion of arbitration proceedings as

provided by prior agreement among the parties and the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-14. The Court subsequently granted petitioners' motion to vacate the arbitration award, remanded the matter to the arbitrators, and denied the motion of Paine-Webber Incorporated ("PaineWebber") to confirm the award. PaineWebber sought certification of an appeal to the District of Columbia Circuit, to which the Circuit consented. That Circuit entered a judgment and opinion on August 15, 1989 ruling that the District Court had erred in not confirming the award and remanding to that Court for entry of a suitable order. Petitioners petitioned timely for rehearing and suggested en banc consideration on September 14, 1989. The District of Columbia Circuit denied such on October 13, 1989.

Jurisdiction of this Court to review the judgment of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

9 U.S.C. § 10:

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon application of any party to the arbitration --

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that

a mutual, final, and definite award upon the subject matter was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT OF THE CASE

Petitioner Ernest E. Sargent ("Sargent") had never invested in the stock market until, at age 50, retired on disability, he opened accounts with Merrill Lynch, Pierce, Fenner & Smith and Anderson and Strudwick. Almost immediately respondent Kevin Greenan ("Greenan") began soliciting his account for PaineWebber Incorporated ("PaineWebber"), telephoning him almost daily, criticizing the handling of his account transactions by the Merrill Lynch account executives, assuring Sargent he could earn much more money for him

than Merrill Lynch could, and offering a 35% commission discount. After three weeks of high pressure salesmanship Sargent switched his accounts, representing his life savings valued at approximately $290.024.00, to PaineWebber.

Greenan falsified PaineWebber's client qualification forms by filling in net worth and income figures higher than the actual figures provided by Sargent. He described Sargent on the forms as an extensively experienced investor, which he plainly was not. Greenan operated Sargent's account as a discretionary account and as a margin account without explaining to Sargent what was involved in such actions after getting his signature on PaineWebber forms. Greenan failed to carry out specific instructions by Sargent to sell stocks if they reached a certain market value. In five months $256,098.00 of Sargent's total investment was

lost while being mismanaged by PaineWebber in this manner.

On September 18, 1984 Sargent filed in the District Court for the District of Columbia a complaint against respondent for negligent management and breach of fiduciary duty. PaineWebber moved to stay proceedings pending arbitration. Sargent honored the agreement to arbitrate he had made with PaineWebber, while asserting that "such a stay of these proceedings is not appropriate as to the plaintiffs' punitive damages claim if the arbitrators do not have authority to award punitive damages to the plaintiffs ... Accordingly, plaintiffs reserve the right to litigate their claim for punitive damages in this action, if necessary, following the completion of arbitration proceedings." (Petitioners' October 29, 1984 RESPONSE TO DEFENDANTS' MOTION TO STAY PROCEEDING PENDING ARBITRATION, Civil Action No. 84-2911). The

Court, Parker, J., granted the stay and dismissed the action "without prejudice to plaintiffs' right to seek relief, if appropriate, following the completion of arbitration." (Order, October 31, 1984).

The New York Stock Exchange ("NYSE") was chosen as the arbitral forum. Sargent filed before it a claim for negligent management of investment account, breach of fiduciary duty and breach of contract.

He sought a total of $800,000.00 in damages, $300.000.00 in compensatory damages and $500,000.00 in punitive damages. Arbitration was to be conducted under NYSE rules, the only rules which Sargent agreed to, a copy of which the NYSE Arbitration Counsel supplied to Sargent. Rule 607 of the rules as provided required that in matters involving public customers like Sargent where the amount in controversy is in excess of $100,000.00 the NYSE was to appoint a panel

of five members. The NYSE Arbitration Counsel sent Sargent, then representing himself pro se, a list of names of three arbitrators who were to form the panel to hear the controversy scheduled for August 13, 1985. Upon receipt Sargent telephoned the Arbitration Counsel to refuse the three proposed arbitrators and to request that other members of the panel be selected to minimize the possibilities of prejudice. During this conversation Sargent pointed out that his controversy involved a claim for $800,000.00 and that rule 607 required that five arbitrators be empaneled. The Arbitration Counsel acknowledged that requirement of the rule, said she would designate five arbitrators, and rescheduled the hearing originally scheduled for August 13, 1985. Nevertheless, the arbitration hearing took place in July, 1986 before a panel of three arbitrators designated by the Arbitration Counsel, and not the five person

panel required by rule 607 which Sargent had requested.*/

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*/Recognizing that matters of record fact must be developed in the trial court, Sargent notes that this discussion with the Arbitration Counsel is not reflected in the record below. It could not be, since, as permitted by NYSE rules, the arbitration panel kept no record. Sargent thus merely represents that, having read the rules supplied to him by the NYSE Arbitration Counsel, he discussed the five person requirement of rule 607 in a telephone conversation with that counsel noting that his claim was over the threshold requiring a five person panel rather than only three arbitrators.

The record of District Court proceedings does reflect that PaineWebber argued in opposition to Sargent's subsequent motion to vacate the arbitration award that in asserting that five arbitrators were required in his case Sargent relied on an out dated version of the rules (December 29, 1986 RESPONSE TO PLAINTIFFS' MEMORANDUM). Paine-Webber's argument had no point, however. The amended version of rule 607 supplied by PaineWebber (in Exhibit I to December 12, 1986 DEFENDANTS' CROSS-MOTION TO CONFIRM ARBITRATION AWARD) provides that five arbitrators shall be named in all matters where the amount in controversy is $500,000.00 or more unless the parties agree in writing to a panel of three arbitrators. Sargent never agreed in writing or in any other manner to a panel of only three arbitrators. This is uncontroverted. The

At the rehearing an expert witness who is a branch manager of a NYSE firm and a former compliance officer gave unchallenged testimony that Sargent's account was grossly mismanaged by PaineWebber. Evidence established that Account Executive Greenan and PaineWebber at their own discretion churned, made unauthorized purchases, and made unsuitable margin deals without Sargent's appreciating the manipulations putting his life savings at risk. On August 16, 1986 the panel ruled in Sargent's favor and awarded him "in full and final settlement" a total of $46,000.00, $43,000.00 was against PaineWebber and $3,000.00 against Greenan. No record of

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record contains no such written agreement. Since his claim exceeded $500,000.00 by $300,000.00, under either version of the rule, the one supplied to Sargent by the NYSE or the one supplied to the Court by Paine-Webber, a panel of five was required if the panel was not to exceed its powers under NYSE rules in this case. The text of both versions is contained in the appendix.

proceedings was kept. No opinion was provided showing whether the arbitrators had considered the punitive damages claim as well as compensatory damages. No computation of damages was provided showing what amount of the award represented compensatory damages and what amount, if any, represented punitive damages. The NYSE denied Sargent's request for a rehearing.

On November 26, 1986 Sargent moved the District Court to vacate the award on grounds, inter alia, that the NYSE had violated its own arbitration rules by having three arbitrators rather than five. Sargent renewed therein his claim before the Court for punitive damages. He alleged that Paine-Webber had employed Greenan in a position of trust although it knew that he had a previous criminal record, having been arrested for stealing money, been convicted of a lesser offense, been fined and given a suspended

jail sentence. Sargent alleged that Paine-Webber knew that Greenan had lied on a 1981 application for a broker's license when he denied ever having arrested for stealing.#/

PaineWebber cross-moved to confirm the arbitration award. The District Court found its responsibility for judicial review

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#/Publicly available documents of the Public Service Commission of the District of Columbia show that while a college student Greenan entered the room of a fellow student who reported the entry to campus security, to which Greenan admitted the entry. Greenan stated - in a Uniform Application for Securities Industry Registration that he had pleaded guilty to a misdemeanor trespass charge. Greenan's statement in this application withheld the facts that he had admitted to the investigating officer that he took $30.00 from the complainant's room, that he was arrested for petit larceny, and that he later pleaded guilty to trespass and was sentenced to 10 days incarceration, suspended conditioned on his making restitution to the complainant and showing one year's good behavior (Docket CJ 00078, General District Court, Williamsburg, Virginia, trial date February 24, 1977). Greenan falsely answered "No" to a question on the Application whether he had ever "been arrested ... for any misdemeanor ... involving any crime in which ... wrongful taking of any property ... was a factor."

extremely difficult to accomplish in the absence of any arbitration record, of any opinion, and of any "explanation of the damage calculation" which was only one fifth of the amount claimed without consideration of the punitive damage claim (December 8, 1987 Memorandum Order). Due to "ambiguity surrounding the Sargent's $46,000 award" and because the Court could not "clearly ascertain the basis for the award" or the scope of arbitral consideration of the matter the Court vacated the award and remanded to the arbitrators for "a full explanation of the manner in which damages were computed" so as to permit effective judicial review. The Court's Order did not require the arbitrators to disclose their reasoning underlying the award beyond explaining the calculations which went into the manner in which damages were computed.

PaineWebber moved for reconsideration. On May 10, 1988 the Court denied reconsideration and reaffirmed its holding "that it should not attempt to enforce an award that is ambiguous, indefinite or irrational." It believed it was necessary to understand the calculation methods used by the arbitrators and again remanded to arbitrators for an explanation of the manner in which damages were computed. In doing so the Court relied on decisions of the Second, Third, Fifth, Sixth, and Ninth Circuits. PaineWebber moved the District Court to certify appeal to the Court of Appeals from its order denying confirmation, representing that "there are substantial controlling questions of law, concerning the subject matter authority of this Court to require arbitrators to explain their award ... as to which there are distinct differences of opinions within this Circuit and with other

Circuits" (May 31, 1988 MOTION FOR CERTIFICATION). The Court of Appeals granted appeal in this case of first impression in the District of Columbia Circuit ("Columbia Circuit").

In an August 15, 1989 decision the Columbia Circuit found no basis for a remand to the arbitrators. It ruled that the District Court's duty had been to confirm the arbitration award and remanded to that Court for entry of a suitable order. It held that a lump-sum award made without opinion or any record of proceedings may not be rejected for want of explanation by the arbitrators in the absence of facts making it appear probable that the arbitrators committed an error justifying vacation of the award. The Court purported to follow the Second Circuit's decision in Sobel v. Hertz, Warner & Co., 469 F.2d 1211 (2d Cir. 1972) - where, unlike the instant case, there was a full transcript of

hearings before five arbitrators under NYSE rules on a $34,000.00 claim - that forcing arbitrators to explain their award even when grounds for it can be gleaned from the record was improper as unjustifiably obstructive of efficiency. PaineWebber had insisted in brief and oral argument that the lump-sum award was intended to resolve the punitive damage claim as well as the compensatory claim. The Court of Appeals rejected Sargent's argument that the award was ambiguous and his suggestion that the arbitrators may not have resolved the punitive damage issue as "utterly fanciful." The Columbia Circuit treated the District Court's request for a "full explanation of the manner in which damages were computed" as identical with insistence on an explanation of the arbitrators' thought process in arriving at an award. The Columbia Circuit agreed in words with the Second Circuit's

declaration that courts may inquire into the basis of a lump-sum award when they believe the arbitrators rendered it in "manifest disregard" of the law or if the facts of the case do not support the award, as stated in Koch Oil, S.A., v. Transocean Gulf Oil Co., 751 F.2d 551, 554 (2d Cir. 1985). The Columbia Circuit recognized that the District Court had apparently proceeded under the theory that in the absence of an explanation it could not be sure that the arbitrators had not "exceeded their powers" under § 10(d) of the Federal Arbitration Act. But the Court of Appeals was silent on the manifest violation, which had been argued to it, of NYSE rules requiring a five person panel if punitive damages were to be considered by arbitrators. The Columbia Circuit apparently did not consider this patent violation sufficient indication that the three person panel had not intended to

consider the punitive damage claim to justify the District Court in remanding to to the arbitrators for an explanation of the manner in which the $46,000 in damages had been computed to determine whether or not some portion had been allocated to punitive damages. Despite the undeniable violation of the rules which Sargent had agreed to be bound by, the Circuit felt both that the three member panel had resolved the punitive damage claim and that, nevertheless "Here there is nothing to suggest that the arbitrators indulged in any disregard of the law."

On September 14, 1989 Sargent petitioned for rehearing and suggested a rehearing en banc, again arguing that a manifest violation of NYSE rules had occurred if the award were considered to have resolved the punitive damage claim. On October 13, 1989 the Court denied the petition and the suggestion.

REASONS FOR GRANTING THE WRIT

I

The first impression decision by the District of Columbia Circuit professedly adopting the Second Circuit's rule accepting lump-sum arbitration awards without explanation of grounds therefor (a) extends that rule beyond the Second Circuit's limits to include cases where no record of proceedings or damage calculation is available from which the grounds for or the meaning of the bare award may be gleaned; (b) conflicts with decisions of other Circuits as well, and (c) overlooks strong indications that the arbitrators exceeded their powers.

The Columbia Circuit rejected the idea "that a lump-sum award can be rejected for want of explanation of the manner in which damages were computed in the absence of facts making it probable that the arbitrators committed error justifying vacation of the award." It cited and purported to follow the Second Circuit's rule exemplified in Sobel v. Hertz, 469 F.2d 1211 (2d Cir. 1985) and Koch

Oil, S.A. V. Transocean Oil Gulf Co., 751 F.2d 551 (2d Cir. 1985). There is a critical difference between the Columbia Circuit's ruling which effectively abolishes judicial review of lump-sum awards made without a record of arbitration and the Second Circuit's rule which does not. The Columbia Circuit applies this rule to lump-sum awards like the instant case where there is no record whatsoever of arbitration proceedings. The Second Circuit does not. In the Second Circuit's Sobel v. Hertz, Warner & Co. case the District Court had before it a complete transcript of arbitration proceedings, and "excellent memoranda of law and summations of counsel" prepared and used before the arbitration panel. The Second Circuit declared that

> "forcing arbitrators to explain their award even when grounds for it can be gleaned from the record will unjustifiably diminish whatever efficiency the (arbitration) process now achieves." 469 F.2d 1211, 1215.

In Sobel there was a complete record from which grounds for the lump-sum award could be gleaned, or from which indications of "manifest disregard of law" or the exceeding of arbitral power could be gleaned. In the instant case there was no arbitration record whatsoever, either complete or not complete, from which either could be gleaned. The difference is the difference between effective judicial review, albeit in a very narrow range, and the effective abolition of judicial review of arbitration proceedings producing a lump-sum award with no record or opinion.

The Columbia Circuit professed to draw the distinction between trial court remands to arbitration for clarification of an award's meaning and remand for an explanation of the arbitrators' reasons for arriving at the award. But it declined to apply that important distinction in this case. Faced with a post arbitration demand by Sargent

that the District Court proceed to hear his punitive damage claim and with a strong showing that the three person arbitration panel would have exceeded its powers under NYSE rules had they determined the punitive damage claim in their "full and final settlement," the District Court Order remand to the arbitrators, not for an explanation of reasons for the cryptic lump-sum award, but for "a full explanation of the manner in which damages were computed so as to permit effective judicial review". Such an explanation which would have shown the puzzled District Judge whether or not the arbitrators had intended to determine Sargent's punitive damage claim as well as his compensatory damage claim. However, the Columbia Circuit treated the District Court's Order as if it had sought the arbitrator's reasons for their award. Though there was nothing in the (non existent) arbitration

record from which anything could be gleaned, whether grounds for the award, clarification or its meaning, manifest disregard of the law, or indications that the arbitrators had probably exceeded their powers, the Columbia Circuit declared that it had been the duty of the District Court to confirm the award and that it had erred in remanding to the arbitrators for an explanation of the manner in which damages had been computed. This case of first impression has put the Columbia Circuit and the Second Circuit in serious conflict.

Other Second Circuit cases, including those relied on by the District Court, show the difference between cases where some arbitration record is available, whether complete or less than complete, and where none whatsoever is available. They show the conflict between the circuits in ruling on these two types of cases. In Siegel v. Titan

Industrial Corp., 779 F.2d 891 (2d Cir. 1985), relied on by the District Court herein, a copious 4,000 page record of arbitral testimony allowed both the District Court and the Second Circuit thereafter to glean support for the arbitration award and to conclude that it should be confirmed. Second Circuit dicta stated that the award "appears to have been reached on the basis of a precise mathematical calculations", so that a remand to arbitrators for clarification would not improperly require arbitrators to reveal their reasons and would have been proper had not an affidavit submitted to the District Court shown that grounds existed for the lump-sum award and made a remand for clarification unnecessary.

In Olympia & York Florida Equity Corp. v. Gould, 776 F.2d 42, 45 (2d Cir. 1985), the District Court had before it 2,500 pages of arbitration transcript and a three page final report stating many rulings on property

disposition which went well beyond a bare lump-sum award. Again there was a copious record from which could be gleaned either support for the award or "manifest disregard" of the law, had such existed. The Second Circuit ordered a remand to arbitrators to deal with a contingency unforeseen at time of the award which developed thereafter.

In Koch Oil, S.A. v. Transocean Gulf Oil Co., 751 F.2d 551 (2d Cir. 1985), which was cited by the Columbia Circuit for the proposition that arbitrators may render a lump-sum award without disclosing their rationale for it and courts will not inquire into the basis therefor unless they believe that the arbitrators rendered it in "manifest disregard" of the law or the facts fail to support the award, it is unclear whether an arbitration record of some sort was or was not available to the District Court. Final briefs submitted to the arbitrators by the

parties were available to the District Court, and a representative of one party had testified at a deposition which was available to the District Court. The lump-sum award was unambiguous and not subject to challenge, as the instant award is, as having been made by arbitrators who exceeded their powers in violation of arbitration rules.

In sum, the Columbia Circuit decision puts the Columbia Circuit into conflict with the Second Circuit by granting immunity to lump-sum awards from remand for explanation of how damages were computed, where the award was made with no arbitration record of any sort, whether complete or incomplete, and with no opinion explaining its meaning even where there is strong reason to think the arbitrators exceeded their powers in determining controversies before them.

Nor does Wilko v. Swan, 346 U.S. 427, 436 (1953) show that the Second Circuit is

incorrect in giving critical value to availability of some record from which support for an unexplained lump-sum award may be gleaned. This Court said there 37 years ago that the arbitrators' award "may be made without any explanation of their reasons and without a complete record of proceedings..." It did not say, as the Columbia Circuit has said in this case, that a lump-sum award is immune from all judicial remand for clarification of the manner in which it was computed where made without any arbitration record whatsoever, either complete or less than complete, from which grounds for the award or an explanation of its meaning may be gleaned by a District Court.

The federal policy favoring arbitration is well known. But there is no federal policy favoring maintenance of obstructions to bringing to light "manifest disregard" of the law or arbitration's exceeding its

jurisdiction. This Court has rather concluded that "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." Shearson/ American Express, Inc. v. McMahon, ____ U.S.____, 107 S. Ct. 2332, 2340 (1987).

The Columbia Circuit is alone, and is in conflict with five other circuits, in holding that a lump-sum award is immune from all judicial remand for explanation of how the damages were computed where there is no arbitration record of any sort from which support for or understanding of the award may be gleaned, absent probability of manifest disregard of the law appearing from the (non-existent) record or failure of facts to support it. No other circuit has taken this position. This conflict is seen in the following decisions of other circuits relied on vainly by the District Judge:

Third Circuit: NF & M Corp. v. United Steelworkers of America, 524 F.2d 756, 760

(3d Cir. 1975) ("An arbitrator is not required to list his reasons for an award. An ambiguity in his opinion should not be seized on to support an inference that he exceeded his authority... Nevertheless, if an examination of the record reveals no support whatever for his determinations, his award must be vacated.")

Fifth Circuit: Oil Chemical & Atomic Workers International Union v. Rohm & Haas Texas, Inc., 677 F.2d 492, 495 (5th Cir. 1982) (per curiam) ("remand to the arbitrators is the appropriate disposition of an enforcement action when an award is patently ambiguous..")

Sixth Circuit: Cleveland Paper Handlers & Sheet Straighteners Union v. E.W. Scripps Co., 681 F.2d 457, 460 (6th Cir. 1972) ("an ambiguous award may not be enforced but should be remanded to the arbitrator.")

Seventh Circuit: Galt v. Libby-Owens-Ford Glass Co., 397 F.2d 439, 442 (7th Cir. 1968) (Construction contract dispute over payment of a bill. Arbitration which produced a transcript of proceedings awarded a sum to one party. Held: because the award did not mention a payment clause in the contract, and it being unclear whether the arbitrators had considered the clause, the District Court properly remanded to arbitrators the question whether they had considered that clause.)

In Shearson Loeb Rhoades, Inc. v. Much, cited by the District Court as C.A. No. 81-4225 at 8-9 (N.D. Ill., Jan. 3, 1983), the District Court was moved by Shearson to vacate an arbitration award finding it liable in a certain damage amount to a customer. The District Court enforced the arbitrators' finding of liability but agreed that the damage amount was "sheer speculation". It remanded the matter to arbitrators for a

recalculation of damages. This is summarized in Shearson Loeb Rhoades v. Much, 754 F.2d 773, 775 (7th Cir. 1985).

The Columbia Circuit's Departure from the Second Circuit's rule puts it in conflict with these cases of the Third, Fifth, Sixth, and Seventh circuits.

Respondents recognized below in their May 31, 1988 motion before the District Court for certification of interlocutory appeal to the Columbia Circuit from the District Court's ruling that, "there are substantial controlling questions of law concerning the subject matter authority of this Court to require arbitrators to explain their award...as to which there are distinct differences of opinion within this Circuit and with other circuits;".

II

The three person panel exceeded its powers in determining a controversy involving in excess of $500,000.00 in

violation of New York Stock Exchange rules. The guidance given by the Court's decision is that judicial review of lump-sum arbitration awards is effectively abolished even as to clear exceeding of arbitral power where the arbitrators provide no record of any sort, no opinion, and no information on their method of computation of the award from which might be gleaned either support for the award or indications that they exceeded their powers.

Clear and conclusive evidence in the District Court record showed that the three arbitrators exceeded their powers under NYSE rule 607, if their lump-sum award "in full and final settlement" were considered to have determined Sargent's punitive damage claim. This conclusive showing, which was argued to the Columbia Circuit, was overlooked in its conclusion that, "Here there is nothing to suggest that the arbitrators indulged in any disregard of the law." The claim as submitted to the three person panel had a total amount in controversy of $ 800,000.00, well over the $ 500,000.00 threshold of NYSE rule 607 which then requires five

arbitrators. This was pointed out to NYSE arbitration authorities before the hearing. Sargent had agreed only to arbitration under rule 607. The three person panel had jurisdiction to hear only controversies involving less than $500,000.00. The Columbia Circuit thought that Sargent's suggestion that the panel had not resolved the punitive damage claim, since for it to do so would violate rule 607, was "utterly fanciful". PaineWebber had argued throughout in brief and in oral argument that the three person panel had determined Sargent's punitive damage claim. Undeniably, then, the three arbitrators exceeded their powers under rule 607 and 9 U.S.C. §10(d). The Columbia Circuit treated this violation of jurisdiction in silence. The significance is not merely that the Columbia Circuit erred in this case, which it plainly did. The greater significance is that this demonstrates the extent to

which the Columbia Circuit holding conflicts with rulings of the Second Circuit and other Circuits. If glaring, undeniable, demonstrated excess of arbitral powers like this is not sufficient to justify judicial query to the arbitrators as to their manner of computing damages and the meaning of their award, it is difficult to imagine what ever would be sufficient under the Columbia Circuit's rule. That the Columbia Circuit did not consider this patent violation justification for seeking arbitral clarification of the meaning of the cryptic lump-sum award demonstrates that the Columbia Circuit ruling conflicts fundamentally with the Second Circuit ruling it professes to adopt. The Columbia Circuit ruling effectively abolishes judicial review of lump-sum awards made without any record of arbitration proceedings or explanation of the meaning of the award, as the Second Circuit does not. It renders 9 U.S.C. §10(d) a nullity. It

conflicts fundamentally with the rulings of at least five other circuits which do maintain the judicial review within a narrow range which Congress intended. This abdication of judicial oversight will not increase small investor confidence in securities market operations. Investors who come to see that courts under the Columbia Circuit ruling have ceased carrying out the judicial review which Congress intended will not see this as a reason for putting their life's savings at risk in such an unjudicially protected churning arena.

III

> This case raises important, unresolved problems of lack of clarity of some lump-sum awards made without an arbitration record of any sort to explain their meaning.

Wilko v. Swan, 346 U.S. 427, 436 (1953) declared that the arbitrators' award may be made "without any explanation of their reasons and without a complete record of

proceedings." It did not say that all judicial requests for explanation of the award were foreclosed where there is no opinion, no arbitration record whatsoever, and no information on computation of damages from which may be gleaned either support for the award, explanation of its meaning where that is unclear, or indications that the arbitrators exceeded their powers.

Concern that greater clarity is needed in the arbitration award process exists. This concern was reflected in the introduction of the "Securities Arbitration Reform Act of 1988", H.R. 4960, 100th Cong., 2d Sess., Section 9 of which would require the arbitrator to give a brief written statement of the reasons for the decision and of the elements of the award. This requirement of the yet unenacted bill was opposed by NYSE Senior Vice President and Secretary James E. Buck, who has supervised arbitration

proceedings at the NYSE for 15 years. His statement was that "Commercial arbitration generally does not contemplate a written opinion, and it is not necessary for any business or oversight purposes. For oversight purposes, the pleadings, the verbatim typed transcripts of the proceedings, the exhibits and the award provide all the information that is required." Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce on H.R. 4960, 100th Cong., 2d Sess. (1988), p. 540. It is significant that Mr. Buck assumed that there is normally a transcript of arbitration proceedings available. That may well be normally the case under NYSE rules, and review of Second Circuit cases indicates that a transcript record is often available in cases which came before that Circuit. But NYSE rules do not require a record of arbitration proceedings; none was kept in the

instant case; and the Columbia Circuit goes beyond cases where some arbitration record is available, whether fully complete or not, and holds that a District Court may not remand for an explanation of the meaning of a lump-sum award or its manner of computing damages where there is no arbitration record whatsoever to clarify such, unless whatever record is before the District Court in the absence of the an arbitration record indicates the probability of "manifest disregard" of the law or absence of supporting facts.

Chairman Hon. Davis S. Ruder of the Securities Exchange Commission (SEC) testified concerning the importance of predispute arbitration clauses in customer trading accounts that a survey of broker-dealers accounting for approximately 90% of all customer trading in the United States showed that 96% of margin accounts, 95% of option accounts, and a growing 39% of all

cash accounts at firms responding to the SEC query are now subject to predispute arbitration clauses. Hearings, supra, p. 483. Chairman Ruder noted that the SEC believes that the H.R. 4960 legislation is premature, Hearings, supra, p. 488, but that, "The Commission has also urged that the arbitration process be subject to public scrutiny through the publication of arbitration results. This goal was furthered when members of SICA [Securities Industry Conference on Arbitration functioning under SEC oversight] reached a consensus on the form of written awards that would include the names of the parties in each case, a summary of the issues resolved, the relief sought or the amount of monetary damage claimed, the damages awarded, the names of the arbitrators, and whether they concurred with or dissented from the award. The SICA proposal appears to be well designed to inform both the parties

and the public of the matters resolved through arbitration. I am hopeful that the SROs [Self Regulating Organizations subject to SEC oversight] will act quickly to implement this proposal." Hearings, supra, pp. 481, 489.

These hearings showed the concern with the importance of the unresolved problems attendant on lump-sum awards made with no arbitration record of any sort and no explanation of their grounds or meaning.

CONCLUSION

The Columbia Circuit ruling introduces confusion and conflict among the circuits in reshaping the Second Circuit rule in manner effectively abolishing judicial review of lump-sum arbitration awards made without an arbitration record of any sort to explain their meaning. The efficiency which the Columbia Circuit ruling aims to bolster acts

to prevent disclosure of arbitrators' exceeding their powers. District Court judges need guidance from this Court. That guidance should not be to be sturdily insensitive to indications that arbitrators have exceeded their powers where, as here, they plainly have. It should be to exercise the judicial review of arbitration awards which Congress intended they should within a narrow range, and not to abdicate their responsibility.

Respectfully submitted,



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89-1144

No. _____

Supreme Court, U.S.
FILED
JAN 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ERNEST E. SARGENT and CYNTHIA L. SARGENT,
Petitioners,

v.

PATHFINDER INCORPORATED, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX A

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United States Court of Appeals
For the District of Columbia Circuit

Argued April 18, 1989 Decided August 15, 1989

No. 88-7133

ERNEST E. SARGENT, et al.

v.

PAINE WEBBER JACKSON & CURTIS, INC., ndba as PAINEWEBBER INCORPORATED, et al., APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 84-02911)

Harvey A. Levin, with whom Michael I. Smith was on the brief, for appellants.

Stephen G. Milliken for appellee.

Before ROBINSON, BUCKLEY, and WILLIAMS, Circuit Judges.

Opinion for the court filed by Circuit Judge WILLIAMS.

WILLIAMS, Circuit Judge: In August 1983 Ernest E. Sargent and his daughter Cynthia L. Sargent opened an account with PaineWebber. To it they transferred 400 shares of Coleco Industries stock, some put and call options on Coleco, and some other (unspecified) securities. Ernest Sargent maintains that this portfolio embodied his life's savings.

The price of Coleco stock had been sinking since the Sargent's original purchase, and it continued to do so after the transfer. Soon after moving the account, Ernest Sargent sought to address the problem by directing Kevin Greenan, a PaineWebber account executive, to implement a "cost averaging plan." This consisted of

> purchas[ing] additional shares of Coleco stock at the decreased market price to reduce his average cost basis in all of his Coleco stock. When the average cost basis of the Coleco stock was equal or close to the market value, Sargeant planned to sell all of that stock thereby eliminating or reducing any financial loss.

Arbitration Complaint ¶ 12. The obvious flaw of such a scheme is that if the stock does not rise as hoped, it will amount to throwing good money after bad.

In any event, the Sargents' claim is that PaineWebber and Greenan were negligent in not rigorously pursuing the plan. They initially brought suit in district court, seeking $245,000 in compensatory damages (later amended to $256,000) and $500,000 in punitives. On PaineWebber's motion to stay the case pending arbitration, as provided in the customer agreements between the Sargents and PaineWebber, the court dismissed the action without prejudice. The arbitrators conducted a three-day hearing and announced a decision awarding the Sargents $46,000. They stated only that

> having heard and considered the proofs of the parties, [a majority of the arbitrators] have decided and determined that in full and final settlement of the above-referenced matter, respondent PaineWebber shall pay to the claimants the

sum of $43,000.00 and respondent Kevin Greenan shall pay to the claimants the sum of $3,000.00.

The arbitrators did not explain how they reached this figure. The parties agree that the New York Stock Exchange rules require no explanation; it appears to be standard practice for arbitrators under those rules to give none.

The Sargents filed a new complaint, asking the district court to vacate the award, while PaineWebber cross-moved for an order of confirmation. Instead the court remanded the matter to the arbitration panel "for a full explanation of the manner in which damages were computed so as to permit effective judicial review." It viewed such an explanation as necessary if judicial review was to be "meaningful."

PaineWebber and Kevin Greenan appeal. They argue that the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982), does not authorize a

remand for explanation under the circumstances. We agree. Before addressing the point, however, we must dispose of the plaintiffs' challenge to our jurisdiction and the defendants' claim that the Sargents' motion to vacate was served too late.

Appellate jurisdiction rests on 28 U.S.C. § 1292 (b) (1982). This allows an interlocutory appeal (with the consent of the court of appeals, which in this case has been granted through a motions panel of this court), where a district judge states, in an otherwise unappealable order, that he is

> of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation...

Application for an appeal under § 1292(b) does not automatically stay proceedings in the district court, but that court or the court of appeals may order a stay. 28 U.S.C. § 1292(b).

The Sargents' attack on our jurisdiction depends on the failure of the district court's order to track the language of § 1292(b), and on its omission of any citation of that section. The order reads:

> Upon consideration of the motion of defendants for a stay pending appeal of this Court's Orders of May 10, 1988 and December 8, 1987, and the opposition thereto, the Court finds (1) that defendants will possibly suffer harm in the lost [sic] of their right and expectation to a speedy and conclusive arbitration process, (2) that defendants have shown that serious questions of law exist, as to this Court's authority to order the arbitrators to file a memorandum with the Court giving a full explanation of the manner in which damages were computed, and (3) that plaintiffs' recovery will not be reduced and their right to recovery will not be diminished by a stay pending appeal.

Sargent v. Paine Webber Jackson & Curtis, Inc., No. 84-2911, Order (D.D.C. June 27, 1988). The order then provides that the remand be "stayed pending appeal, pursuant to Rule 62, Fed. R. Civ. P." Id. A motions panel of this court granted defendants' application for an appeal, citing § 1292(b)

and making findings in precisely its words. It added that the court was not deciding whether "in the absence of a section 1292(b) certification, there is an appealable order."

It is hard to view our earlier order except as reading the district court order as a certification under § 1292(b). If there be any ambiguity in our initial decision, however, we have no difficulty in making that finding ourselves. Obviously dispute may be avoided if district courts couch their §1292(b) certifications in its terms and, to remove all doubt, cite it by section number. But the words of § 1292(b) are not a magic incantation (or a computer command) that has no effect if not given exactly. The court's intentions are plain. Not only are the words fairly close to those of § 1292(b), but there appears no explanation for the district court's stay other than as one that § 1292(b) authorizes as an accompaniment to a § 1292(b) certification. We have jurisdiction.

Defendants claim that the Sargents' claim was barred by the special three-months statute of limitations contained in 9 U.S.C. § 12 (1982). It requires:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.

9 U.S.C. § 12 (1982) (emphasis added). The Sargents' complaint and motion were served November 26, 1986,[1] more than three months after the arbitrators' decision but within three months of the Sargents' receipt of it on August 26, 1986.

---

[1]The docket entries show only that the new complaint and motion to vacate were filed November 26, 1986, but the parties have treated this as the controlling date. This is correct if the Sargents served the papers by mail on the date of filing, and if (despite dismissal of the original complaint) the new one may be regarded as a "pleading subsequent to the original complaint" within the meaning of Rule 5(a), Fed. R. Civ. P., as Rule 5(b) makes service by mail complete on mailing.

Defendants argue that "delivered" in the phrase "filed or delivered" must mean "mailed, or otherwise sent." They suggest that since delivery must always follow a decision's filing, to read it as referring to the arrival at some destination would render "filed" meaningless. Certainly defendants have identified a curiosity in the statute, but their interpretation hardly solves it: they suggest no way in which mailing could precede filing any more than delivery. Perhaps the drafters contemplated the possibility of some technically defective filing, and wanted to be sure that in such a case the time limit would begin to run on delivery. We certainly see no reason to adopt a construction that hopelessly twists the ordinary meaning of the word "delivered" without in any way solving the problem of possible surplusage. Nor would we be justified in excising "delivered" from the statute.

Defendants' argument that delivery is not synonymous with receipt does no better. While one can imagine cases in which the distinction could play a role, this is not one. The Sargents acknowledge receipt of the decision on the day it was delivered to the relevant address, and their complaint and motion were served within the required three months thereafter.

Turning to the merits, we find no basis for a remand to the arbitrators. The district court's review proceeds under § 10 of the Federal Arbitration Act, which authorizes it to vacate an arbitral award under any of the following conditions:

> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any

other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 10 (1982). The district court here appears to have proceeded under the theory that in the absence of explanation it could not be sure that the arbitrators had not "exceeded their powers" under § 10(d) or otherwise fallen into error so egregious as to require vacation of the award under § 10. Remand for explanation would enable it to obtain that assurance and exclude the possibility of a fatal error.

We reject the idea that a lump-sum award can be rejected for want of explanation (or, what is in effect almost the same thing, remanded for an explanation) in the absence of

facts making it appear probable that the arbitrators committed an error justifying vacation of the award. If courts required an explanation on account of the mere possibility of such an error, they could in effect be requiring explanation almost universally. The Supreme Court has observed that arbitral awards may be made without explanation, see Wilko v. Swan, 346 U.S. 427, 436 (1953), and the Second Circuit has so held. Sobel v. Hertz, Warner & Co., 469 F.2d 1211 (2d Cir. 1972). It reasoned that while arbitration "may not always be the speedy and economical remedy its admirers claim it is," id. at 1215,

> forcing arbitrators to explain their award even when grounds for it can be gleaned from the record will unjustifiably diminish whatever efficiency the process now achieves.

Id. (footnote omitted). In that case the arbitrators said only that they dismissed the claim, but, given the presence of "a number of theories" on which they might have decided,

id., the court found no need of further proceedings. Thus, the court plainly believed that the necessary "gleaning" was normally possible so long as the record disclosed a permissible route to the stated conclusion.

The Second Circuit has rigorously applied this view. Even where the size of an award was said to suggest that the arbitrators might have considered lost profits or consequential damages despite a contractual agreement disallowing such recoveries, it held that

> arbitrators may render a lump sum award without disclosing their rationale for it, and ... when they do, courts will not inquire into the basis of the award unless they believe that the arbitrators rendered it in "manifest disregard" of the law or unless the facts of the case fail to support it.

Koch Oil, S.A. v. Transocean Gulf Oil Co., 751 F.2d 551, 554 (2d Cir. 1985). The court refused to vacate the award, viewing the challenge as no more than "speculation."

Clearly insistence on an explanation would increase the ability of courts to spot the

sort of "manifest disregard" of the law that justifies overturning an arbitral award. Compare Wilko v. Swan, 346 U.S. at 440 (Frankfurter, J., dissenting, asserts ability of courts to discover arbitrators' disobedience of the law, asserting as a premise the point rejected by majority--that they must give some form of opinion from which the disobedience will appear). But the absence of a duty to explain is presumably one of the reasons why arbitration should be faster and cheaper than an ordinary lawsuit. We thus agree with the Second Circuit that an explanation requirement would unjustifiably undermine the speed and thrift sought to be obtained by the "federal policy favoring arbitration," Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983).

Here there is nothing to suggest that the arbitrators indulged in any disregard of the law. PaineWebber's defense throughout has

been comparative negligence and ratification: that Ernest Sargent (who described himself as a first-time investor) was sophisticated, knew the risks, himself "directed" the trading in his account (he denied this), received notice of PaineWebber's trades, and failed to complain about PaineWebber's actions or alleged inactions during the crucial first five months he maintained an account--the months during which the losses occurred. Thus, it seems likely that in some form the arbitrators apportioned blame to both sides and calculated the award accordingly; plaintiffs offer no basis for thinking that such an outcome showed "manifest disregard" of the law.

Plaintiffs rely heavily on decisions or dicta approving remand of an arbitral award for clarification of its meaning. See, e.g., Galt v. Libbey-Owens-Ford Glass Co., 397 F.2d 439 (7th Cir. 1968) (approving remand to

determine whether arbitrators treated specific contract clause as within purview of arbitration provision); Sobel v. Hertz, Warner & Co., 469 F.2d at 1216 (alluding to and distinguishing cases of remand to clarify what issues arbitrators resolved). These clearly have no application here. Plaintiffs' suggestion that the panel may not have resolved the punitive damages issue is utterly fanciful.

Plaintiffs also note the observation in Siegel v. Titan Industrial Corp., 779 F.2d 891 (2d Cir. 1985), that where an award "appears to have been reached on the basis of a precise mathematical calculation,"

> [a] remand for clarification ... would not improperly require arbitrators to reveal their reasons, but would instead simply require them to fulfill their obligation to explain the award sufficiently to permit effective judicial review.

Id. at 894. We do not read this as any material qualification of the view taken by the Second Circuit in Sobel. The court

proceeds to cite Sobel immediately after the quoted passage and in fact goes on to hold that, despite obscurity as to the arithmetic leading to the award, there was no "manifest error," id., and that the district court correctly declined to remand. Further, the circumstance to which the Second Circuit referred--apparent use of a "precise mathematical calculation"--is absent here.

The defendants' and district court's invocation of the goal of rendering judicial review "effective" or "meaningful" of course resonates with innumerable decisions in the field of administrative law remanding to an agency for a new or clearer articulation of its reasoning. As early as SEC v. Chenery Corp., 318 U.S. 80, 94 (1943), the Court remanded for a further explanation, stating that "the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under

review." See also Greater Boston Television Corp v. FCC, 444 F.2d 841, 850-53 (D.C. Cir. 1970). But as we have recently noted in another context, the statement cannot be read as a statement of any literal impossibility of meaningful or effective judicial review. Women Involved in Farm Economics v. Department of Agriculture, 876 F.2d 994, 998-1000 (D.C. Cir. 1989). The Chenery court itself presented the requirement as manifesting a special form of deference to administrative agencies: a judicial assumption that an agency relied on a specific policy judgment, where there was no clear reason to think it had, would "intrude upon the domain which Congress has exclusively entrusted" to the agency. Chenery, 318 U.S. at 88; see also id. at 94-95; Women Involved, 876 F.2d at 999 (reliance on an argument of counsel "might actually restrict improperly the agency's future freedom of action"). The concern for

preserving an agency's policymaking discretion clearly has no place in the context of arbitration.

More generally, it is simply not true that insistence on an explanation of the decision-maker's thought process is an automatic requirement of "effective judicial review." In the context of arbitration, where there is no statutory requirement that the panel state its reasons, and (as here) none imposed by the institution under whose auspices that arbitration occurred, it would seem to turn on a balance between the interest in rooting out possible error and the interest in assuring that judgment be swift and economical. We agree with the Second Circuit that the latter must generally prevail. As the record here fails to indicate the probability of "manifest disregard" of the law, there is no basis to insist on an explanation.

On the facts before it, the district court's duty was to grant the motion to confirm the award. The case is remanded for entry of a suitable order.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERNEST E. SARGENT, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	No. 84-2911
	)	
PAINE WEBBER, JACKSON & CURTIS, INC. et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM ORDER
(Denying Defendants' Motion for Reconsideration)

Defendant's Paine Webber, Jackson and Curtis, Inc. have moved for reconsideration of this Court's Memorandum Order of December 8, 1987, which vacated the arbitral award of August 19, 1986, and remanded the matter to the New York Stock Exchange ("NYSE") Arbitration Panel. The Court's Memorandum Order directed that the arbitration panel provide a full explanation of the manner in

which $46,000 damages awarded to plaintiffs were computed so as to permit effective judicial review. Defendants argue that the plaintiffs' motion to vacate the August 19th award was untimely and barred by the Federal Arbitration Act ("FAA"). 9 U.S.C. §§ 1-14. They also contend that this Court exceeded its authority in vacating and remanding the award.

After a review of the legal memoranda submitted by the parties, as well as the applicable law, this Court finds no new evidence, argument, or law that would justify reconsideration of the Court's December 8, 1987 Memorandum Order. For the reasons set forth below, the Court denies the defendant's motion for reconsideration.

FACTUAL BACKGROUND

The award in question here was rendered on August 19, 1986, but was not filed in the

formal sense. Rather, it was sent by letter dated August 21, to plaintiffs' attorney, Marc White. It is not clear when Mr. White received the letter. Plaintiffs state however, and it is not disputed, that they did not receive a copy of the arbitral decision until August 27, 1986. On September 4, 1986, plaintiff Earnest Sargent and his attorney both wrote to the Director of Arbitration at the NYSE and requested a hearing de novo. The Director denied their requests in a letter dated September 23, 1986. Prior to receiving the Director's letter, on September 25, 1987, attorney White wrote to Mr. Sargent, informing him that he was "willing to go through another hearing at the [arbitration panel] if they grant our request." In the event that the request was denied, Mr. White indicated that he would possibly be "willing to file a motion to vacate" the $46,000 award for the plaintiffs.

For reasons not reflected in the record and at a date uncertain, Mr. White later chose not to represent the plaintiff.

As a result of attorney White's latent unwillingness to file an action to vacate the arbitration award, plaintiffs had less than two months to file such an action. On November 26, 1986, more than three months from the date of the award, but less than three months from plaintiffs' August 27, 1986 receipt of the decision, plaintiffs filed a pro se motion to vacate the arbitration panel's award.

On December 8, 1987, this Court granted plaintiffs' motion and vacated the arbitral award of August 19, 1986. Because the award to plaintiffs represented less than 20 percent of the approximately $256,000 which they had lost during the period the defendants managed their investment accounts, the Court held that it could not clearly ascertain the

basis for the award, nor could it be certain whether the arbitration panel considered all the relevant information. Given the uncertainty and ambiguity surrounding the award, the Court ordered that the matter be remanded to the arbitration panel for a full explanation of the manner in which damages were computed so as to permit effective judicial review. Defendants' cross-motion to confirm the award was denied.

On December 17, 1987, defendants filed the present motion for reconsideration of the Court's Memorandum Order. The Sargents, now represented by counsel, opposed the defendants' motion.

LEGAL ANALYSIS

A.

The Court will first address the defendants' challenge that the plaintiff's motion to vacate was time-barred by a

three-month statute of limitation. Section 12 of the FAA provides in part:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.

9 U.S.C. § 12 (emphasis added).

The very language of 9 U.S.C. § 12 is ambiguous -- the date that the award is "filed or delivered" can lead to different results as is evident from the case law. Some courts have interpreted the phrase to mean the date designated on the face of the award. (Witt v. Reinholdt & Gardner, 587 F.2d 383, 384 (8th Cir. 1978); Colavito v. Hockmeyer Equipment Corp., 605 F. Supp. 1482, 1487 (S.D.N.Y. 1985)). Other courts look to the date the award was filed or entered, referring to the date the award was actually docketed as contrasted to the date on the face of the award. (Foster v. Turley, 808 F.2d 38, 41 (10th Cir. 1986); (Tokura

Construction Co., Ltd. v. Corporacion Raymond, S.A., 533 F. Supp. 1274 (S.D. Tex. 1982). However, several courts have held that an application to vacate must be made within three months of receipt of the decision. (Dinger v. Anchor Motor Freight, Inc., 501 F. Supp. 64 (S.D.N.Y. 1980) ("An application to vacate or modify an arbitral award must be made within three months of receipt of the decision under federal law." Id. at 68 (citing 9 U.S.C. § 12) (emphasis added). Because the plaintiff challenged the arbitrator's award more than eleven months after receiving the decision, the court held that his claim was time-barred.) If "delivery" of the award is deemed to be receipt of the award, as declared in Dinger, the motion to vacate was timely filed by the Sargents.

1.

But even if the "delivery" of the award is determined to be the day it was mailed,

plaintiffs' right to judicial review of the award is not forfeited because the doctrine of equitable tolling should be applied in this case.

The equitable tolling doctrine is "read into every federal statute of limitation." Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946). Numerous courts have held that the equitable tolling doctrine is "plainly available to federal securities law plaintiffs." Osterneck v. E.T. Barwick Industries, Inc., 825 F.2d 1521 (11th Cir. 1987) (citing Schaefer v. First National Bank, 509 F.2d 1287, 1295-96 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976). While this proceeding is not a federal securities law case, the activities involved were of a commercial nature. In tolling the statute of limitations in the commercial context, courts look for fraud on the part of the defendants and diligence on the part of the plaintiffs.

Osterneck, supra, at 1535; Suslick v. Rothschild Securities Corp., 741 F.2d 1000, 1004 (7th Cir. 1984).

Time limits for filing actions under Title VII are subject to equitable tolling, as well. In Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982), the Supreme Court held that a time limit for filing a discrimination claim was "like a statute of limitations, ... subject to waiver, estoppel, and equitable tolling." A court's equitable power to toll a statute of limitations may be exercised in carefully circumscribed instances. The Supreme Court has laid out examples of when a court may properly allow tolling:

> [Where] a claimant has received inadequate notice, ... where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon, ... where the court has led the plaintiff to believe that she had done everything required of her ... [or] where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction.

Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984) (per curiam) (citations omitted).

The facts in this case fall within the circumscribed instances as defined by the Supreme Court. Plaintiffs believed that the NYSE may hold a new hearing in their case; they also thought their attorney may pursue a possible motion to vacate the arbitrators' award; plaintiff Earnest Sargent explored several avenues of additional relief; in the end, he filed a motion to vacate the award himself.

The fact that plaintiff Sargent filed his motion pro se lends further support to the application of the doctrine of equitable tolling. This Circuit has recently held that an appellant who brought a suit in forma pauperis should not have his case dismissed for failure to comply with the 30-day time

limit to serve his complaint.[1] Mondy v. Secretary of the Army, No. 86-5644, slip op. (D.C. Cir. April 26, 1988). In Mondy, the plaintiff's complaint was served upon the defendant four months after he received notice regarding the final agency action on his employment discrimination claim. Under the relevant statute, the time for the plaintiff to bring suit began running from the date of his receipt of notice of final action on his claim. Because the plaintiff was filing in forma pauperis and diligently pursued his complaint, the court of appeals applied the doctrine of equitable tolling. Id. at 6-13.

The Mondy court referred to two circuit cases involving an in forma pauperis party for further support. In Paulk v. United

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[1]While the case before this Court was brought pro se, there is no reason to believe that an in forma pauperis case would be given greater indulgence than a pro se case.

States, 830 F.2d 79, 83 (7th Cir. 1987), the Seventh Circuit held that a 30-day time limit was tolled during the pendency of a petition to proceed in forma pauperis. In Cooper v. Bell, 628 F.2d 1208 (9th Cir. 1980), the Ninth Circuit found that the need for equitable tolling is strongest when a claimant is filing an action for himself at the outset, because he will be "unschooled in the filing procedure" and less articulate about his claim. Id. at 1213 & n. 10.

Plaintiff Sargent acted diligently and therefore, the Court may properly invoke equitable principles to excuse his slight delay. See Baldwin County Welcome Center, supra, at 151. See also, Mondy, supra, at 3, 13. The due diligence exception to 9 U.S.C. § 12 was recognized in Holodnak v. Avco Corp., 381 F. Supp. 191 (D. Conn. 1974), rev'd in part on other grounds, 514 F.2d 285 (2nd Cir.), cert. denied, 423 U.S. 892

(1975). In Holodnak, the plaintiff's motion to vacate an arbitrator's award was served three months and one day after the filing of the arbitration award. The district court judge and the magistrate who heard pre-trial motions both denied the defendant's argument that the plaintiff's motion to vacate was time-barred. They emphasized the due diligence of the plaintiff in attempting to perfect service within the time limit and the absence of any prejudice suffered by the defendants as a result of the one-day delay. 381 F. Supp. at 197. The trial court agreed that the circumstances of the service did not represent a bar to the action and it granted plaintiff's motion to vacate the arbitrator's decision.

Plaintiff Sargent's efforts to comply with 9 U.S.C. § 12 would qualify for this exception. Depending upon the interpretation of "filed or delivered," plaintiff's motion

was anywhere from eight days late to one day early. The courts dismissing motions for being untimely under 9 U.S.C. § 12 have involved cases where service has been many months or years beyond the three month deadline. See Witt v. Reinholdt & Gardner, supra (Plaintiff filed suit to invalidate an arbitration award more than two years after the arbitration proceeding); Colavito v. Hockmeyer, supra (November 1983 filing was untimely with respect to an October 1982 arbitrator's award); Gas Workers Local No. 80 v. Michigan Consol. Gas Co., 503 F. Supp. 155 (E.D. Mich. 1980) (Proceeding to set aside award was filed eleven months after arbitrator denied request for reconsideration and hence, was untimely); Pizzuto v. Hall's Motor Transit Co., 409 F. Supp. 427 (E.D. Va. 1976) (Complaint filed more than twelve months after arbitration of employment grievance was not timely).

2.

In light of plaintiff's attempt to seek a hearing de novo, his attorney's failure to file a motion to vacate, the plaintiff's pro se status, and his diligent effort to serve his motion within the three month period, along with the different interpretations of "filed or delivered," this Court holds that plaintiff Earnest Sargent's motion to vacate the arbitration award of August 19, 1987, was not time-barred.

B.

Regarding the defendants' argument that this Court exceeded it authority in vacating the arbitrators' award, this Court adheres to its original holding that it should not attempt to enforce an award that is ambiguous, indefinite or irrational. See NF & M Corp. v. United Steelworkers of America, 524 F.2d 756 (3rd Cir. 1975) ("If an examination of

the record before the arbitrator reveals no support whatever for his determinations, his award must be vacated." Id. at 760). The Court upholds its position that for judicial review to be meaningful, an arbitrator's award cannot be absolutely immune from scrutiny. See Siegel v. Titan Industrial Corp., 779 F.2d 891, 894 (2d Cir. 1985); Olympia & York Florida Equity Corp. v. Gould, 776 F.2d 42, 45-46 (2nd Cir. 1985); Cleveland Paper Handlers & Sheet Straighteners Union, No. 11 v. E.W. Scripps Co., 681 F.2d 457, 460 (6th Cir. 1982) (per curiam) Oil Chemical & Atomic Workers Int'l Union v. Rohn & Haas Texas, Inc., 677 F.2d 492, 495 (5th Cir. 1982) (per curiam); Americas Ins. Co. v. Seagull Compania Naviera, S.A., 774 F.2d 64, 67 (2nd Cir. 1980); Shearson Loeb Rhoades Inc. v. Much, C.A. No. 81-4225 at 8-9 (N.D. Ill, Jan. 3, 1983). These cases were relied upon in the Court's December 8, 1987

Memorandum Order and further research indicates that they are still good law.

When reviewing arbitration awards it is necessary for a court to understand the calculation methods used by the arbitrators. Siegel, supra, at 894. The Court is not asking too much in seeking a clarification of the illusionary and ambiguous mathematical calculation utilized in arriving at plaintiffs' $46,000 award. See Douglas Aircraft Co. v. NLRB, 609 F.2d 352, 354 (9th Cir. 1979) ("It was proper to obtain from the arbitrator a clarification of his reasoning. The original opinion was ambiguous, and indeed the clarified opinion belied the Board's confident interpretation of the original." Id. at 354 (citations omitted)). The award represents a fraction of the $256,000 amount which the plaintiffs claim they lost due to defendants' breach of fiduciary duty.

To avoid judicial guessing as to the rationale behind the award and to permit effective judicial review, it was entirely appropriate for this Court to vacate and remand the arbitrators' award for further explanation.

Accordingly, it is this 10th day of May, 1988,

ORDERED

That defendant's motion for reconsideration of this Court's Memorandum Opinion of December 8, 1987, is denied.

This matter is remanded to the NYSE Arbitration Panel for a full explanation of the manner in which damages were computed so as to permit effective judicial review. The panel shall act expeditiously on this matter and file an appropriate memorandum in accordance with the Memorandum Order of

December 8, 1987, and this Order, on or before July 1, 1988.

[signed]
Barrington D. Parker
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ERNEST E. SARGENT, et al.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 84-2911
	)	
PAINE WEBBER, JACKSON & CURTIS, INC. et al.,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM ORDER
(Vacating Arbitration Award and Remand)

Plaintiffs, Ernest and Cynthia Sargent, filed this action against the brokerage house, Paine Webber, Jackson & Curtis, Inc. ("Paine Webber"), and several of its agents alleging negligent management of plaintiffs' investment accounts. On October 31, 1984, an Order was entered dismissing without prejudice, allowing plaintiffs the right to

seek appropriate judicial relief, following the completion of arbitration proceedings as provided under earlier agreements between the required parties. Plaintiffs' submission to an arbitration board was required by the "Client Option Agreements," and was mandated by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-14.[1]

Arbitration took place in July 1986, before a panel of three arbitrators selected in accordance with New York Stock Exchange ("NYSE") Rules. On August 19, 1986, in a 2-1 decision, the panel awarded the Sargents $46,000, representing less than 20 percent of the approximately $260,000 that plaintiffs had lost during the period the defendants managed their account.

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[1] The Federal Arbitration Act provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2 (1987).

Plaintiffs then moved this Court to vacate the arbitral award; Paine Webber filed a cross motion seeking confirmation of the award.

For the reasons set forth herein, the Court grants plaintiffs' motion to vacate the arbitration award and denies defendants' cross-motion. The matter is remanded to the NYSE Arbitration Panel for clarification.

BACKGROUND

In July 1983, plaintiffs retained Paine Webber to manage their stock portfolio, consisting primarily of shares of stock and put and call options in Coleco Industries. Sometime after their initial purchases of Coleco, the share price of that stock declined. To minimize or eliminate losses, plaintiff Earnest Sargent devised a "cost averaging plan," whereby he would purchase additional shares of Coleco at the reduced

market price and hold them until the price began to rise. Under this plan, plaintiffs could recover losses at a per-share price lower than that at which they made their initial purchases. This plan required that defendants be attentive to the daily fluctuations in the value of Coleco stock and to respond accordingly without delay.

Throughout the fall of 1983 and into 1984, plaintiffs' investment managers allegedly ignored crucial changes in the price of Coleco and failed to respond according to instructions. As a result, plaintiffs lost money which they estimated at some $256,000. In an attempt to regain their losses, plaintiff instituted suit in this Court.

As permitted by the NYSE rules, the arbitration panel kept no record and entered no findings of fact or conclusions of

law.[2] Marc White, then serving as plaintiff's attorney in the arbitration proceedings, apparently felt the award was so grossly deficient as to "constitute [ ] error that must be remedied."[3] Even so, Mr. White evidently did not agree with plaintiffs on the proper basis for further action and consequently ceased representing their interests. Subsequent to the arbitration award the plaintiffs' have not been represented by counsel and their motion to

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[2] Rule 624 of the New York Stock Exchange Rules states: "Unless requested by the arbitrators or a party or parties to a dispute, no record of an arbitration shall be kept." NYSE, Arbitration Rules, Article XI, Rule 624 (1983).

[3] Exhibit D to plaintiffs' Motion to Vacate (letter from Marc A. White to Robert S. Clemente Esq., Director of Arbitration, NYSE, dated September 4, 1986).

vacate the arbitration award was filed pro se.[4]

DISCUSSION

A district court has the prerogative to exercise independent review of an arbitration award under the Federal Arbitration Act. 9 U.S.C. §§ 9-10 (1987). Section 10 of the Act specifically gives United States district courts the power to vacate arbitration awards. Id. § 10. Even so, courts must bear in mind that judicial review of arbitrators' decisions is very narrowly limited.

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[4] Plaintiffs also allege that the dissenting arbitrator, Mr. William Jones, was biased. According to the plaintiff, Mr. Jones was party to Nunes v. Legg, Mason, Wood & Walker, Inc., C.A. No. 81-0119, a securities fraud action in which Paine Webber's employees allegedly appeared as witnesses. Mr. Jones however, was not a party to the suit, he was merely an officer of the corporate defendant. Paine Webber's involvement in the case was even more tenuous -- the record reveals that Paine Webber's deposition was noticed, not that it was actually taken. Nunes was dismissed shortly thereafter.

It is well settled, however, that a court should not attempt to enforce an award that is ambiguous, indefinite or irrational. Although a court is precluded from overturning errors in factual determinations, "nevertheless, if an examination of the record before the arbitrator reveals no support whatever for his determinations, his award must be vacated." NF & M Corp. v. United Steelworkers of America, 524 F.2d 756, 760 (3d Cir. 1975) (emphasis added).

Since the record before the arbitrators has not been presented and the decision by the panel is very brief and unaccompanied by any explanation of the damage calculation,[5]

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[5] The August 19, 1986, Arbitration Decision was a standardized form with the following customized phrase:

> [In] full and final settlement of the above-referenced matter, respondent Painewebber [sic] shall pay to the claimants the sum of $43,000.00 and respondent Kevin Greenan shall pay to the claimants the sum of $3,000.00, and

this Court cannot determine whether the award is supported by the record. It is also impossible to discern what calculation led to a final award which was only one-fifth of the amount claimed by the plaintiffs. In light of these deficiencies, effective judicial review of the arbitration award is extremely difficult.

For judicial review to be meaningful, an arbitrator's award cannot be absolutely immune from scrutiny. Siegel v. Titan Industrial Corporation, 779 F.2d 891, 894 (2d Cir. 1985). Several courts have remanded awards to arbitrators to clarify their meaning or effect. See Olympia & York Florida Equity Corp. v. Gould, 776 F.2d 42, 45-46 (2d Cir. 1985) (award was ambiguous and "warrant[ed] a

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further upon claimants [sic] request and with the consent of respondents the claims of the claimants against respondents Bruce Edginton, C. Jordan Ball and Joan Doyle are in all respects dismissed.

remand to the arbitrators to enable them to state what their true intention was. . . ."); Americas Ins. Co. v. Seagull Compania Naviera, S.A., 774 F.2d 64, 67 (2d Cir. 1980) ("an ambiguous award should be remanded to the arbitrators so that the court will know exactly what it is being asked to enforce."); Cleveland Paper Handlers & Sheet Straightners Union, No. 11 v. E.W. Scripps Co., 681 F.2d 457, 460 (6th Cir. 1982) (per curiam) ("an ambiguous award may not be enforced but should be remanded to the arbitrator."): Oil Chemical & Atomic Workers International Union v. Rohn & Haas Texas, Inc., 677 F.2d 492, 495 (5th Cir. 1982) (per curiam) ("remand to the arbitrator is the appropriate disposition of an enforcement action when an award is patently ambiguous. . ."); Shearson Loeb Rhoades Inc. v. Much, C.A. No. 81-4225 at 8-9 (N. D. Ill., Jan. 3, 1983) ("the court concludes that the award is

without support in the record. . . . . the court therefore, in the exercise of its discretion, directs a rehearing by the Arbitrator of the damage calculations.")

When reviewing arbitration awards, it is often necessary for a court to understand the calculation methods utilized by the arbitrators. In Siegal, the Second Circuit held:

> Where. . . . an arbitrator's award appears to have been reached on the basis of a precise mathematical calculation, it is desirable, and in some cases may be necessary, to know the basis for the calculations underlying the award. A remand for clarification in such circumstances would not improperly require arbitrators to reveal their reasons, but would instead simply require them to fulfill their obligation to explain the award sufficiently to permit effective judicial review. 779 F.2d at 894 (emphasis added).

If considerable doubt surrounds an award, a court is justified in remanding it back to the arbitrators. In Shearson Loeb, the district court held that the basis for an arbitration award favoring the brokerage

house's customer was not clear and remanded for a recalculation of the damages. Working with more evidence and a more detailed record than is now before this Court, the Shearson Loeb court determined that the damage portion of the award was based on "sheer speculation." Noting that newly discovered evidence is not a proper basis for remanding an arbitration award, the court stated that it "expects the parties to present new and hopefully more precise methods for determining the extent of Mr. Much's [the customer's] damages from the primary facts already of record." C.A. No. 81-4225 at 3 (N. D. Ill., Oct. 20, 1983).

When Shearson Loeb appealed the district court's vacation and remand of the award, the Seventh Circuit sent the case back to the arbitrator. Shortly thereafter, the arbitrator held a damages hearing and the final arbitration award, confirmed by the

district court, was much different than the original award.

It is entirely appropriate for a district court to direct arbitrators to explain their awards. Galt v. Libbey-Owens-Ford Glass Co., 397 F.2d 439, 442 (7th Cir. 1968). This method avoids any judicial guessing as to the rationale behind the award. Remands do not constitute judicial invasions of the arbitrator's province but rather serve to give the parties what they bargained for -- a clear decision from the arbitrators.

This Court cannot clearly ascertain the basis for the plaintiff's award, nor can it be certain whether the arbitration panel considered all the relevant information. Given the ambiguity surrounding the Sargents' $46,000 award, a remand to the arbitrators appears to be appropriate. While arbitration awards generally receive deferential review by the courts, deference is not abdication.

For this Court to engage in meaningful judicial review of plaintiff's award, the basis for the calculations underlying the award must be made known.

For the reasons set forth above, it is this 8th day of December, 1987.

ORDERED

Plaintiffs' motion to vacate the arbitral award of August 19, 1986, is granted, and the award, be and it is vacated. This matter is remanded to the NYSE Arbitration Panel for a full explanation of the manner in which damages were computed so as to permit effective judicial review. Defendant's cross motion to confirm is denied. The Panel shall act expeditiously on the matter and file its final decision with this Court 45 days from the date of this Order.

[signed]
Barrington D. Parker
United States District Judge

Text of Rule 607 "Designation of Number of Arbitrators" of Arbitration Rules of Department of Arbitration, New York Stock Exchange as supplied by respondent Paine-Webber Incorporated to the United District Court for the District of Columbia in Exhibit I to DEFENDANTS' CROSS-MOTION TO CONFIRM ARBITRATION AWARD filed December 12, 1986 in C.A. No. 84-2911

Rule 607. Designation of Number of Arbitrators

(a)(1) Except as otherwise provided in this Code in all arbitration matters involving public customers and other non-members where the matter in controversy does not exceed the amount of $500,000, or where the matter in controversy does not involve or disclose a money claim, the Arbitration Director shall appoint an

arbitration panel which shall consist of no less than three (3) nor more than five (5) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer or non-member requests a panel consisting of at least a majority from the securities industry.

(2) In all arbitration matters involving public customers and other non-members where the amount in controversy is $500,000 or more, the Director of Arbitration shall appoint an arbitration panel which shall consist of five (5) arbitrators unless the parties agree in writing to a panel of three (3) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer or non-member requests a panel consisting of at least a majority from the securities industry.

(b) Composition of Panels

The individuals who shall serve on a particular arbitration panel shall be determined by the Director of Arbitration. The Director of Arbitration may name the chairman of each panel.

Text of Rule 607 "Designation of Number of Arbitrators" of Arbitration Rules of Department of Arbitration, New York Stock Exchange ("NYSE") as supplied by NYSE Arbitration Counsel to petitioner Ernest E. Sargent and as supplied by petitioner to the United states District Court for the District of Columbia in Exhibit I to MEMORANDUM AND POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO CONFIRM AND TO NOT VACATE AWARD filed December 19, 1986 in C.A. No. 84-2911

Rule 607. Designation of Number of Arbitrators

(a) Public Controversies

(1) Except as otherwise provided in this Code in all arbitration matters involving public customers, and where the matter in controversy does not exceed the amount of

$100,000, or where the matter in controversy does not involve or disclose a money claim, the Director of Arbitration shall appoint an arbitration panel which shall consist on no less than three (3) nor more than five (5) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer requests a panel consisting of at least a majority from the securities industry.

(2) In all arbitration matters involving public customers where the amount in controversy is $100,000 or more, the Director of Arbitration shall appoint an arbitration panel which shall consist of five (5) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer requests a panel consisting of at least a majority from the securities industry.

(b) Composition of Panels

The individuals who shall serve on a particular arbitration panel shall be determined by the Director of Arbitration. The Director of Arbitration may name the chairman of each panel.

United States Court of Appeals
For the District of Columbia Circuit

No. 88-7133

September Term, 1989
CA 84-02911

Ernest E. Sargent, et al.

v.

Paine Webber, Jackson & Curtis, Inc.,
n/d/b/a PainWebber Incorporated, et al.,

Appellants

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges

O R D E R

Appellants' Suggestion For Rehearsing En Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: [signed]
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit

No. 88-7133

September Term, 1989
CA 84-02911

Ernest E. Sargent, et al.

FILED OCT. 13, 1989

v.

Paine Webber, Jackson & Curtis, Inc., n/d/b/a PainWebber Incorporated, et al.,

Appellants

BEFORE: Buckley and Williams, Circuit Judges, Robinson, Senior Circuit Judge

O R D E R

Upon consideration of appellants' petition for rehearing it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: [signed]
Robert A. Bonner
Deputy Clerk

No. 89-1144

FILED
FEB 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

ERNEST E. SARGENT and CYNTHIA SARGENT,
Petitioners,

v.

PAINEWEBBER INCORPORATED and KEVIN GREENAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS PAINEWEBBER INCORPORATED AND KEVIN GREENAN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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DATED: February 22, 1990

CASILLAS PRESS INC. - 1717 K STREET NW WASHINGTON DC 20036 - 223-1220

QUESTIONS PRESENTED

1. Should this Court grant the petition for a writ of certiorari to review an arbitration award (A) when petitioners have alleged at most a procedural, not substantive, error by the New York Stock Exchange panel with respect to a New York Stock Exchange procedural rule; (B) where the New York Stock Exchange arbitration rules provide that the arbitrators are empowered to interpret and determine the applicability of the rules; (C) where petitioners failed to bring to the attention of the arbitrators at any time petitioners' complaint regarding the application of the rule; (D) where petitioners fail to show that the rule was not applied correctly; and (E) where petitioners fail to demonstrate any prejudice.

2. Should this Court grant the petition for a writ of certiorari to review, vacate and remand to the arbitrators a clear, unconditional, lump-sum arbitration award when petitioners have demonstrated no grounds for vacation or reversal under the Federal Arbitration Act, 9 U.S.C. § 10.

3. Should this Court grant the petition for a writ of certiorari to review an arbitration award (A) where there is no conflict between or among the Circuit Courts of Appeals; and (B) when to do so would upset the long-standing federal policy favoring arbitration and the principles of speed and thrift sought to be obtained by that federal policy.

LISTING OF PARENTS, SUBSIDIARIES AND AFFILIATES

Respondent PaineWebber Incorporated is a wholly owned subsidiary of Paine Webber Group Inc., a publicly held corporation the stock of which is listed on the New York Stock Exchange. Paine Webber Group Inc., through PaineWebber Incorporated and other wholly owned subsidiaries, owns 100% of the outstanding voting stock of over 200 entities that carry on business on behalf of Paine Webber Group Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LISTING OF PARENTS, SUBSIDIARIES AND AFFILIATES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

FACTS AND PROCEEDINGS 3

THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI 10

1. The Petition Should Be Denied Because (A) Petitioners Have Alleged At Most A Procedural, Not Substantive, Error By The NYSE Arbitration Panel With Respect To An NYSE Rule; (B) The NYSE Rules Provide That The Arbitrators Are To Interpret And Apply The Rules; (C) Petitioners Did Not Raise Their Procedural Objection And Claim Of Rule Violation With The Arbitrators; (D) Petitioners Have Failed To Show That The Rule Was Not Applied Correctly; and (E) Petitioners Have Failed To Show Any Harm 10

   A. Petitioners Complain Of A Procedural Violation Only Under NYSE Rules 10

   B. The NYSE Rules, By Which Petitioners Agreed To Be Bound, Lodged Sole Authority For The Interpretation And Application Of NYSE Rules In The Arbitrators 14

Page

C. Petitioners Did Not Raise Their Procedural Objection and Claim Of Rule Violation With The Arbitrators 14

D. Petitioners Fail To Show That NYSE Rule 607 Was Not Applied Correctly 15

E. Petitioners Fail To Show Any Harm Resulting From Any Alleged Incorrect Interpretation Or Application Of Rule 607 18

2. The Petition Should Be Denied Because The Lump-Sum Award Was Clear, Unconditional And Unambiguous And Was Based On Grounds Inferrable From The Record 19

A. The Award Was Clear And Unambiguous 19

B. A Basis For The Award Is Inferrable From The Record 21

3. The Petition Should Be Denied Because (A) There Is No Conflict Between Or Among The Circuit Courts of Appeals; And (B) Certiorari Would Upset Long-Standing Federal Policy Favoring Arbitration And Contravene The Principles Of Speed And Thrift Underlying That Federal Policy 23

A. There Is No Conflict Between Or Among The Circuit Courts Of Appeals 23

B. Certiorari Would Upset The Long-Standing Federal Policy Favoring Arbitration And Contravene The Principles Of Speed And Thrift Underlying That Policy 26

CONCLUSION 28

TABLE OF AUTHORITIES

Cases **Page**

Atlanta-Tomberlin, Inc. v. Eastern Board of Cherokee Indians, 672 F. Supp. 887 (W.D.N.C. 1987).....19, 21

Ballantine Books, Inc. v. Capital Distributing Co., 302 F.2d 17 (2d Cir. 1962).....19

Comprehensive Accounting Corp. v. Rudell, 760 F.2d 138 (7th Cir. 1985), *aff'd*, 802 F.2d 926, *cert. denied*, 480 U.S. 907 (1987).....15

Fairchild & Co. v. Richmond, Fredericksburg and Potomac R. Co., 516 F. Supp. 1305 (D.D.C. 1981).....17, 18, 19, 21

Ficek v. Southern Pacific Co., 338 F.2d 655 (9th Cir. 1964), *cert. denied*, 380 U.S. 988 (1965).....13, 15

Florasynth, Inc. v. Pickholz, 750 F.2d 171 (2d Cir. 1984).....16

French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 784 F.2d 902 (9th Cir. 1986).....16, 17, 20

Galt v. Libbey-Owens-Ford Glass Co., 397 F.2d 439 (7th Cir.), *cert. denied*, 393 U.S. 925 (1968).....25, 26

Hale v. Friedman, 281 F.2d 635 (D.C. Cir. 1960).....24

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964).....11, 12

Page

Kahal v. J.W. Wilson & Assoc., Inc.,
673 F.2d 547 (D.C. Cir. 1982).....16

Koch Oil, S.A. v. Transocean Gulf Oil Co.,
751 F.2d 551 (2d Cir. 1985).....8, 19, 21, 24

Kurt Orban Co. v. Angeles Metal Systems,
573 F.2d 739 (2d Cir. 1978).....19, 20

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985).....17, 26

Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis,
849 F.2d 264 (7th Cir. 1988).....15

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983).....9, 16, 24

Olympia & York Florida Equity Corp. v. Gould,
776 F.2d 42 (2d Cir. 1985).....25

Peters Fabrics, Inc. v. Jantzen, Inc.,
582 F. Supp. 1287 (S.D.N.Y. 1984).....15

Refino v. Feuer Transportation, Inc.,
480 F. Supp. 562 (S.D.N.Y. 1979), *aff'd*,
633 F.2d 205 (2d Cir. 1980).....20

Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917 (1989).....18

Sargent v. Paine Webber, Jackson & Curtis, Inc.,
882 F.2d 529 (D.C. Cir. 1989).....*passim*

Sargent v. Paine Webber, Jackson & Curtis, Inc.,
687 F. Supp. 7 (D.D.C. 1988).....1, 8, 25

Page

Sargent v. Paine Webber, Jackson & Curtis, Inc.,
674 F. Supp. 920 (D.D.C. 1987).....1, 8, 25

Shearson/American Express, Inc. v. McMahon,
482 U.S. 220, 107 S. Ct. 2332 (1987).....11-13, 17, 18, 26

Shearson Loeb Rhoades, Inc. v. Much,
C.A. No. 81-4225 (N.D. Ill, Jan. 3, 1983)
(unreported), *appeal dismissed*,
754 F.2d 773 (7th Cir. 1985).....26

Siegel v. Titan Indus. Corp.,
779 F.2d 891 (2d Cir. 1985).....16, 17, 19, 20, 24

Sobel v. Hertz, Warner & Co.,
469 F.2d 1211 (2d Cir. 1972).....8, 19, 21, 24, 27, 28

Svoboda v. Negey Assoc., Inc.,
655 F. Supp. 1329 (S.D.N.Y. 1987).....19

Tinaway v. Merrill Lynch & Co.,
692 F. Supp. 220 (S.D.N.Y. 1988).....19, 21, 22

United Steelworkers v. American Mfg. Co.,
363 U.S. 564 (1960).....12

United Steelworkers v. Enterprise Wheel and Car Corp.,
363 U.S. 593 (1960).....12-14, 16, 21

Wilko v. Swan,
346 U.S. 427 (1953).....6, 8, 11-13, 17, 24

Other

14A C. Wright, A. Miller & E. Cooper,
Federal Practice and Procedure: Jurisdiction 2d
§ 3702.....12, 13

IN THE

Supreme Court of the United States

October Term, 1989

No. 89-1144

ERNEST E. SARGENT and CYNTHIA SARGENT,
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PAINEWEBBER INCORPORATED and KEVIN GREENAN,
Respondents.

BRIEF OF RESPONDENTS PAINEWEBBER INCORPORATED AND KEVIN GREENAN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit in *Sargent v. Paine Webber, Jackson & Curtis, Inc.* is reported at 882 F.2d 529 (D.C. Cir. 1989) and is reprinted at pp. 1a-20a of the Appendix to the Petition for a Writ of Certiorari. The two opinions of the United States District Court for the District of Columbia, granting petitioners' motion to vacate the arbitration award and denying respondents' motion for reconsideration, are, respectively, reported at 674 F. Supp. 920 (D.D.C. 1987) and 687 F. Supp.

7 (D.D.C. 1988) and reprinted at pp. 40a-52a and pp. 21a-39a of the Appendix.

JURISDICTION

Petitioners invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves subsection (d) of section 10 of the Federal Arbitration Act, 9 U.S.C. § 10. Section 10 in full is as follows:

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT OF THE CASE

The Petition for a Writ of Certiorari is the latest, and properly the final, stage of petitioners' five-plus-year effort to litigate with respondents over the alleged negligent mismanagement of petitioners' brokerage account by Paine Webber, Jackson & Curtis, Inc., now doing business as PaineWebber Incorporated, and certain of its personnel.

Petitioners obtained a $46,000 award in arbitration on August 19, 1986. By certiorari, petitioners would have this Court further extend their long-running effort by vacating the award, remanding it to the arbitrators and ordering the panel of arbitrators, appointed by the New York Stock Exchange ("NYSE") pursuant to the agreement between petitioners and respondents to arbitrate their disputes, to file with the District Court a memorandum providing "a full explanation of the manner in which damages were computed," in the absence of any facts suggesting that the arbitrators indulged in any disregard of the law, in the absence of any grounds making it appear probable that the arbitrators committed error and in the absence of any reason to believe that petitioners were denied a full opportunity to present their claim, were denied full and *bona fide* consideration by the arbitrators or otherwise were, in any way, harmed by the arbitration process.

Nothing in the law of arbitration, and nothing in the record, justifies this action.

FACTS AND PROCEEDINGS

On September 18, 1984, petitioners Ernest E. Sargent and Cynthia L. Sargent (together, "Sargent" or "petitioners") filed in the District Court a "Complaint for Negligent Management of Investment Account and Breach of Fiduciary Duty" against Paine Webber, Jackson & Curtis, Inc. and certain of its employees (together, "PaineWebber" or "respondents").

PaineWebber moved to stay proceedings on the complaint in the District Court pending arbitration pursuant to the arbitration clause of the customer agreement between PaineWebber and Sargent. In response, Sargent elected to proceed to arbitration and did not oppose PaineWebber's motion. Sargent then filed a virtually identical complaint (the "Complaint," appended to this brief at pp. 1a-8a) before the NYSE.

According to the Complaint, Sargent transferred existing brokerage accounts to PaineWebber in August 1983. Prior to switching his accounts to PaineWebber, Sargent had maintained, and had purchased securities in, accounts at two brokerage firms, Merrill Lynch and Anderson & Strudwick. The transferred accounts included common stock and also riskier put and call options of Coleco Industries. Complaint ¶ 13.

As testimony in the arbitration proceeding also made clear, Coleco securities were a particularly risky investment, a fact which was known to Sargent. The market value of the securities in Sargent's accounts had decreased during the period that Sargent had been trading through the two antecedent brokerage firms and continued to decrease after the transfer to PaineWebber. *Id.*

To avoid further financial loss, Ernest Sargent, an accountant, "decided on a cost averaging plan" based on his own knowledge of the market, involving hedging his existing portfolio of Coleco securities through additional purchases of Coleco stock in a declining market. *Id.* Sargent informed PaineWebber of the manner in which he intended to trade his securities and thereafter "instructed" and "directed" various PaineWebber personnel to make purchases in the market in furtherance of his cost averaging plan. *Id.* ¶¶ 15-17, 20, 23. Sargent's cost averaging plan, entailing continuous, additional, speculative purchases of Coleco securities over a five-month period, failed.

In the Complaint, Sargent did not complain that PaineWebber had been responsible for counseling or directing Sargent's transactions in Coleco securities pursuant to his risky, self-devised and self-directed "cost averaging plan." Rather, Sargent's claim was based on PaineWebber's alleged failure to effect certain buys and sells in furtherance of the plan, as conceived and directed by Sargent. *Id.* ¶¶ 17, 20 and 23. Sargent sought compensatory damages of $256,000, punitive damages of $500,000 and other, incidental relief.

PaineWebber answered, denying Sargent's allegations of wrongdoing and raising eight affirmative defenses. Particularly, PaineWebber alleged that Sargent was an experienced and sophisticated investor; that Sargent's own conduct had caused or contributed to the claimed losses; that Sargent had full knowledge of the transactions and with that knowledge had allowed matters to proceed; that Sargent had authorized and/or ratified the transactions in his account; that the demand for punitive damages was improper as a matter of law; and that the Complaint failed to state a claim on which punitive damages could be awarded.

With the assistance of counsel, Sargent aggressively and fully prosecuted his claim in arbitration. The hearing covered three days. Sargent was given the opportunity to present his case fully through both documentary and testimonial evidence, including expert testimony. At the time, Sargent made no claim of unfairness, impropriety or error in the conduct of the arbitration hearings. Particularly, Sargent never objected to being heard before three (versus five) arbitrators and otherwise never made either the arbitrators or PaineWebber aware of any discontent with the number or composition of the panel. Such is implicitly conceded in the Petition, at 16-17.

Although (1) Sargent had brought to PaineWebber existing

accounts of securities, including risky put and call options in speculative securities; (2) Sargent had "directed" his own cost averaging plan with respect to his account, including direction of the purchases of thousands of dollars of Coleco securities in an uncertain and declining market; (3) Sargent did not complain initially of any PaineWebber culpability in making these purchases; and (4) over the five-month period in question, Sargent had received full and timely notice of the transactions, yet continued his cost averaging program without surcease, on August 19, 1986 the arbitrators awarded Sargent a total lump sum of $46,000, $43,000 against the firm PaineWebber and $3,000 against broker Kevin Greenan individually.

Pursuant to the NYSE rules and long-standing, accepted arbitration practice, the arbitrators were under no obligation to explain the basis for the determination that Sargent was entitled to an award of $46,000.[1] Nor did any party request of the arbitrators that they provide an explanation of their decision. Furthermore, because neither Sargent nor PaineWebber had requested that a verbatim record be kept, none was.

Consequently, the August 19, 1986 majority arbitration decision[2] stated as follows:

> [I]n full and final settlement of the above-referenced matter, respondent Painewebber shall pay to the claimants the sum of $43,000.00 and respondent Kevin Greenan shall pay claimants the sum of $3,000.00, and further, upon claimants request and with the consent of respondents the claims of the

[1] *See Wilko v. Swan*, 346 U.S. 427, 436 (1953), and its progeny, including the instant case.

[2] Two arbitrators signed the award. The third arbitrator dissented, favoring no award at all.

> claimants against respondents Bruce Edgington, C. Jordan Ball and Joan Doyle are in all respects dismissed.

Sargent was dissatisfied with this award. He moved to vacate in the District Court in a document entitled "Motion to Vacate Arbitration Award and for Reconsideration of Damages and Complaint for Punitive Damages." Sargent's Motion indicated quite clearly that the primary basis was his perception that the one white member of the three-person arbitration panel (who had dissented from the award) was so biased against Sargent, a black, that the white arbitrator successfully had influenced the two black members of the arbitration panel to award Sargent far less than the amount to which he was entitled: "[The white panel member] apparently intimidated the two black non-member [*i.e.*, not associated with the securities industry] arbitrators and adversely affected the outcome of the decision." According to Sargent, he had the right to demand of the New York Stock Exchange a panel of arbitrators consisting of a black, a Jew and a female (Sargent's ideal panel comprised three, not five, arbitrators), and because he did not receive a panel of precisely that composition, the panel he did receive was biased against him. PaineWebber opposed Sargent's motion and cross-moved for confirmation of the award.

On December 8, 1987, in a Memorandum Order, the District Court vacated the arbitration award, despite finding that the panel was not biased against Sargent. The basis of the District Court decision was the failure of the NYSE panel to set forth an explanation for its $46,000 award. Despite the rule, recognized by the District Court, that the NYSE arbitration panel was under no obligation to explain its decision, the District Court concluded that the award was "ambiguous" and "illusory" without an explanation of how the arbitrators had arrived at $46,000 and that it was impossible to determine

whether the Court should enforce the award without an explanation of how it had been reached. Therefore, the Court vacated the award, remanded the dispute back to the arbitrators and ordered the arbitrators to file a memorandum with the Court providing a "full explanation of the manner in which damages were computed . . . ." The Court gave the arbitration panel forty-five days in which to complete this task. *Sargent v. Paine Webber, Jackson & Curtis, Inc.*, 674 F. Supp. 920, 923 (D.D.C. 1987).

PaineWebber moved for reconsideration of the District Court's decision. Meanwhile, the forty-five day period passed without appearance or responsive action by the NYSE or the arbitrators. On May 10, 1988, in a second Memorandum Order, the District Court denied PaineWebber's motion for reconsideration and reiterated its order of vacatur and remand and that the NYSE arbitration panel file with the District Court, this time by July 1, 1988, a full explanation of the manner in which damages were computed. *Sargent v. Paine Webber, Jackson & Curtis, Inc.*, 687 F. Supp. 7, 11 (D.D.C. 1988). Once again, neither the NYSE nor the arbitrators took responsive action.

PaineWebber appealed. The Court of Appeals unanimously reversed, ordering that the District Court grant PaineWebber's motion to confirm the award. *Sargent v. PaineWebber, Jackson & Curtis, Inc.*, 882 F.2d 529, 533 (D.C. Cir. 1989). On the principal points, the Court of Appeals held:

1. A lump-sum arbitration award cannot be rejected for want of an explanation or remanded for an explanation in the absence of facts making it appear probable that the arbitrators committed an error justifying vacation of the award, citing *Wilko v. Swan*, 346 U.S. 427, 436 (1953), *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1215 (2d Cir. 1972), *Koch Oil, S.A. v. Transocean Gulf Oil Co.*, 751 F.2d 551, 554 (2d Cir. 1985),

and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). 882 F.2d at 532.

2. There was nothing to suggest that the arbitrators had indulged in any disregard of the law. *Id.*

3. The record provided a basis for the arbitrators' award, from which "it seem[ed] likely that . . . the arbitrators apportioned blame to both sides and calculated the award accordingly." *Id.*

4. Sargent's suggestion that the arbitrators had not properly resolved the punitive damages issue was "utterly fanciful." *Id.* at 533.

Sargent's petition for reconsideration and rehearing *en banc* was denied, and the instant petition for a writ of certiorari followed.

THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI

1. The Petition Should Be Denied Because (A) Petitioners Have Alleged At Most A Procedural, Not Substantive, Error By The NYSE Arbitration Panel With Respect To An NYSE Rule; (B) The NYSE Rules Provide That The Arbitrators Are To Interpret And Apply The Rules; (C) Petitioners Did Not Raise Their Procedural Objection And Claim Of Rule Violation With The Arbitrators; (D) Petitioners Have Failed To Show That The Rule Was Not Applied Correctly; and (E) Petitioners Have Failed To Show Any Harm.

A. Petitioners Complain Of A Procedural Violation Only Under NYSE Rules.

Petitioners' main complaint is that under NYSE Rule 607 (the cited NYSE rules are appended to this brief at pp. 9a-10a), they were entitled to a panel of five arbitrators, not the three to whom petitioners presented their case. *See* Petition at 1, Question 1, 16-17, 39-41. The argument is that Rule 607 provides for five arbitrators in controversies of $500,000 or more unless the parties agree otherwise, and that while petitioners' total losses and compensatory damages claim were under $300,000, their $500,000 punitive damages claim made this an $800,000 controversy and thus caused the five-arbitrator provision to be invoked.

Even were petitioners correct, and they are not, they have not stated grounds for this Court to grant the requested petition. Petitioners do not claim that there was any substantive error or misapplication of law. They do not argue that the arbitrators misperceived or misapplied the law of negligence,

breach of fiduciary duty or breach of contract, or even of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, which was not an express basis for the Complaint. Rather, petitioners argue only that there was procedural error, that under NYSE Rule 607 the case should have been heard by two more persons. It is, however, axiomatic that this Court, and indeed the lower federal courts as well, will not sit in judgment over these procedural issues. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964):

> Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.

See also Wilko v. Swan, supra at 436 (footnote omitted):

> As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact" . . . cannot be examined.

Effectively, petitioners would have this Court vastly expand the federal courts' limited power to vacate arbitration awards. *See Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, ____, 107 S. Ct. 2332, 2340 (1987). Petitioners want the Court of Appeals' decision reversed, and the District Court's vacatur and remand reinstated, on the basis of an alleged deviation from NYSE Rule 607. In other words, petitioners seek adoption of the principle that federal courts must examine arbitrators' and arbitral forums' procedural determinations and must vacate awards, and remand for explanation, whenever federal courts are uncertain about the interpretation and application of the forum's procedural rules.

This is directly contrary to the well established limitations on federal court review powers set down by statute in the Federal Arbitration Act and by case law in such cases as *Wilko* and *McMahon*. There is no warrant in this case to grant certiorari to overthrow these established limitations.

Even were this Court to open its doors to review of such procedural uncertainties, thereby converting those doors to floodgates, this Court should not do so where, as here, review necessarily involves consideration of the merits. Federal courts simply should not, and will not, delve into the merits of an arbitration. *John Wiley & Sons, Inc. v. Livingston, supra* at 557. *See United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960): "The Courts . . . have no business weighing the merits . . . ."; *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599 (1960): "It is the arbitrator's construction which was bargained for . . . the courts have no business overruling him because their interpretation . . . is different from his."

In order to determine whether or not the procedure employed in petitioners' arbitration conformed to NYSE Rule 607, the reviewing court will have to explore and assay the deliberations and conclusions of the NYSE arbitration department and arbitrators regarding whether petitioners met the "matter in controversy" or "amount in controversy" tests of Rule 607. This review will require judicial consideration of both the merits of petitioners' compensatory and punitive damages claims and the application of the NYSE's standards regarding the value of the matter in controversy to those claims, in order to determine the correctness of the NYSE's decision on the number of arbitrators. *Cf.* 14A C. Wright, A. Miller & E.Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3702 at 23-25.

The NYSE must be accorded wide discretion in deter-

mining whether petitioners' punitive damages claim was to be included in the matter in controversy and whether the claim, if it were to be included, was sufficient to meet the five-arbitrator threshhold. Such discretion includes the right to exclude punitive damages altogether from the value of the matter in controversy. *See id.* at nn. 21 and 63.

Certiorari is particularly inadvisable in this case simply to inquire into NYSE procedural standards and discretionary determinations regarding their applicability. *See Shearson/American Express, Inc. v. McMahon, supra* at ____, 107 S. Ct. at 2340, citing *Wilko v. Swan, supra* at 436-37:

> Finally, *Wilko* noted that the "[p]ower to vacate an award is limited," and that "interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."

Finally, and most fundamentally, this Court should not open up judicial review of the NYSE's decision on the number of arbitrators because that decision has nothing to do with arbitrability of this matter or the NYSE's power to arbitrate this matter. These issues were determined previously by petitioners and respondents in their written agreement to arbitrate all disputes, subject to petitioners' choice of forum (petitioners chose the NYSE). That is, the source — the sole source — of the arbitrators' jurisdiction or power is the parties' agreement to arbitrate and their presentation to the arbitrators. *See, e.g., United Steelworkers v. Enterprise Wheel and Car Corp., supra* at 598; *Ficek v. Southern Pacific Co.*, 338 F.2d 655, 657 (9th Cir. 1964), *cert. denied*, 380 U.S. 988 (1965).

So much is evident from Rule 607. The Rule itself is titled "Designation of Number of Arbitrators" and clearly sets out only the number of arbitrators, not the basic question of power to arbitrate. Moreover, the Rule expressly contemplates

agreements by the parties to limit the number of arbitrators, indicating that the parties' agreement, not the Rule, is the genesis of the forum's jurisdiction. *See United Steelworkers v. Enterprise Wheel and Car Corp., supra* at 599.

B. The NYSE Rules, By Which Petitioners Agreed To Be Bound, Lodged Sole Authority For the Interpretation And Application Of NYSE Rules In The Arbitrators.

Petitioners agreed to proceed under the NYSE Rules and to be bound by the arbitrators' decisions on and under the Rules. *See United Steelworkers v. Enterprise Wheel and Car Corp., supra* at 599. NYSE Arbitration Rule 622 expressly provides:

> The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code which interpretation shall be final and binding upon the parties.

Petitioners in effect now want this Court to abrogate their agreement or, alternatively, to vitiate this Rule so as not to be bound by it. Neither this subject matter nor the relief sought is appropriate for certiorari.

C. Petitioners Did Not Raise Their Procedural Objection And Claim Of Rule Violation With The Arbitrators.

Even were petitioners persuasive that as a matter of principle, the restrictions on judicial review of arbitration awards should be forsaken to allow vacatur and remand because of an alleged error in the number of arbitrators, petitioners cannot succeed because they never brought their objection to the

attention of the arbitrators (or of PaineWebber). By proceeding before the three arbitrators, and submitting their claim for decision to the three arbitrators, without objecting to or otherwise informing the panel of the objection to its composition, petitioners waived their right to challenge the number of arbitrators in court. On this, the federal courts are uniform. *See, e.g., Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis*, 849 F.2d 264, 267-69 (7th Cir. 1988); *Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138, 140-41 (7th Cir. 1985), *aff'd*, 802 F.2d 926, *cert. denied*, 480 U.S. 907 (1987); *Ficek v. Southern Pacific Co., supra* at 657. For a case on point on closely analogous facts, *see Peters Fabrics, Inc. v. Jantzen, Inc.*, 582 F. Supp. 1287, 1291-92 (S.D.N.Y. 1984). Accordingly, there is no reason for this Court to grant certiorari.

D. Petitioners Fail To Show That NYSE Rule 607 Was Not Applied Correctly.

Petitioners simply assume that because (1) their Complaint sought a total of $756,000 in compensatory and punitive damages and (2) NYSE Rule 607 provides for three arbitrators where the "matter in controversy" is less than $500,000 but for five arbitrators where the "amount in controversy" is $500,000 or greater, petitioners were absolutely entitled to five arbitrators under Rule 607. That is not necessarily the case. NYSE Arbitration Rules do not state that punitive damages claims (or claims for treble damages, interest, attorneys fees, costs or other similar relief) are, or must be, included in valuing the "matter in controversy" or "amount in controversy" for purposes of Rule 607.[3] NYSE arbitration officials

[3]The use first, in Rule 607(a), of "matter in controversy," rather than "amount in controversy," as the operative criterion indicates that petitioners' simple equation that total damages sought equals the determinative figure under Rule 607 is incorrect. Rather, consistent with the underlying notion of arbitration, the arbitrators are to bring and apply their ex-

and/or the arbitrators readily could have found that the value of the matter in controversy was the compensatory damages claim, without the punitive damages amount included. Indeed, that determination would have been facially correct, as the Complaint was for negligence, breach of fiduciary duty and breach of contract, theories of relief which in and of themselves do not permit recovery of punitive damages. Mere invocation of the magic words for punitive damages is not a token guaranteeing that amount in controversy requirements have been met, even under the liberal pleading standards of the Federal Rules of Civil Procedure. *See Kahal v. J.W. Wilson & Assoc., Inc.*, 673 F.2d 547 (D.C. Cir. 1982).

Because it is possible, even likely, that NYSE arbitration personnel and/or the arbitrators applied Rule 607 correctly, federal courts cannot second guess or disturb the arbitration. *See, e.g., French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902, 908 (9th Cir. 1986), citing, *inter alia, Moses H. Cone Memorial Hospital v. Mercury Construction Corp., supra* at 24-25; *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 893, 894 (2d Cir. 1985). This refusal to intervene is especially appropriate where petitioners have shown nothing harmful, or even untoward, in the application of the Rule or in the arbitrators' actions.

Even were such a plausible, and likely correct, application of Rule 607 not discernible from the record, and even were the misinterpretation of Rule 607 evident from the record, that would not permit a federal court to disturb the award. Errors in the interpretation or application of law by arbitrators, "in contrast to manifest disregard" of the law, "are not subject,

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perience, expertise and judgment, when asked, to the issue of the value of the matter in controversy. *See generally United Steelworkers v. Enterprise Wheel and Car Corp., supra* at 597; *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 173-74 (2d Cir. 1984).

in the federal courts, to judicial review . . . ." *Wilko v. Swan, supra* at 436-37. *See French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra* at 906 (citations omitted):

> "The rule is, though the 'arbitrators' view of the law might be open to serious question, . . . [an award] which is within the terms of the submission, will not be set aside by a court for error either in law or fact' . . . ."

"Manifest disregard" of the law exists only where the arbitrators plainly understand and correctly state the law, but proceed to ignore it nonetheless. *Siegel v. Titan Indus. Corp., supra* at 893; *Fairchild & Co. v. Richmond, Fredericksburg and Potomac R. Co.*, 516 F. Supp. 1305, 1315 (D.D.C. 1981). Petitioners do not make any showing whatsoever that the arbitrators were consciously aware of a principle of law but disregarded it nevertheless. As is evident from the two District Court opinions below, and as the Court of Appeals expressly found, petitioners have never made a showing of manifest disregard of the law, *i.e.*, have never presented the key to unlock the door of substantive federal court review, let alone to invite the extreme remedy of vacatur and remand. *Sargent v. Paine Webber, Jackson & Curtis, Inc., supra*, 882 F.2d at 532.

Moreover, this Court has made it clear that the attention of the federal courts in this respect is to be focused on "substantive rights." *Shearson/American Express, Inc. v. McMahon, supra* at ____, 107 S. Ct. at 2340, citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 633-34 (1985). Petitioners point to no trenching of any substantive right, whether or not the result of "manifest disregard" of the law. Nor is there any to be found in this case.

E. Petitioners Fail To Show Any Harm Resulting From Any Alleged Incorrect Interpretation Or Application Of Rule 607.

Petitioners do not show any harm, prejudice or unfairness which resulted from the alleged erroneous interpretation or application of NYSE Rule 607. Before the judicial intervention into the arbitration process sought by the Petition is justified, petitioners must show harm or unfairness. *See, e.g., Fairchild & Co. v. Richmond, Fredericksburg and Potomac R. Co., supra* at 1314 (citations omitted):

> The error which would constitute misconduct so as to justify vacating an award must not simply be an error of law, but one which so affects the rights of a party that it may be said to deprive him of a fair hearing.

The logic of requiring that palpable, substantial harm or unfairness result before a court will vacate an arbitration award has been a constant theme of this Court from at least *Wilko v. Swan* in 1953 through *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989). *See Shearson/American Express, Inc. v. McMahon, supra* at ____, 107 S. Ct. at 2340.

Arbitration is intended to relax the procedures, limitations and expenses of court actions. Arbitrators are intended to have wide discretion in conducting hearings, and the resulting awards are immune from judicial review even if the product of erroneous interpretations of law or erroneous determinations of fact. Thus, error alone will not cause an award to be disturbed and should not give rise to certiorari. Here error alone is all, at most, that petitioners argue. The Court of Appeals below was wholly correct and in line with the decisions of this Court, and of every other court, when it ruled:

> We reject the idea that a lump-sum award can be rejected . . . in the absence of facts making it appear probable that the arbitrators committed an error justifying vacation of the award.

Sargent v. Paine Webber, Jackson & Curtis, Inc., supra, 882 F.2d at 532.

2. The Petition Should Be Denied Because The Lump-Sum Award Was Clear, Unconditional And Unambiguous And Was Based On Grounds Inferrable From The Record.

A. The Award Was Clear And Unambiguous.

Never in the reported history of federal court review of arbitration awards has a lump-sum award, such as the one in this case, ultimately been vacated and remanded for an explanation. *See, e.g., Siegel v. Titan Indus. Corp., supra* at 893-95; *Koch Oil, S.A. v. Transocean Gulf Oil Co., supra* at 554; *Kurt Orban Co. v. Angeles Metal Systems,* 573 F.2d 739, 740-41 (2d Cir. 1978); *Sobel v. Hertz, Warner & Co.,* 469 F.2d 1211, 1216 (2d Cir. 1972); *Ballantine Books, Inc. v. Capital Distributing Co.,* 302 F.2d 17, 22 (2d Cir. 1962); *Tinaway v. Merrill Lynch & Co.,* 692 F. Supp. 220, 226 (S.D.N.Y. 1988); *Atlanta-Tomberlin, Inc. v. Eastern Board of Cherokee Indians,* 672 F. Supp. 887, 889 (W.D.N.C. 1987); *Svoboda v. Negey Assoc., Inc.,* 655 F. Supp. 1329, 1333 (S.D.N.Y. 1987); *Fairchild & Co. v. Richmond, Fredericksburg and Potomac R. Co., supra* at 1312-16. Despite the unanimity of the courts refusing to second-guess arbitrators' lump-sum awards, and despite the explicit, definite and unambiguous award of $46,000 "in full and final settlement" of all claims, petitioners attempt to gain certiorari by questioning whether the arbitrators decided petitioners' punitive damages claim.

There is no cause to break from this history in this case. Petitioners were awarded $46,000, $43,000 against Paine Webber, Jackson & Curtis, Inc. and $3,000 against Kevin Greenan, "in full and final settlement" of petitioners' claims. Petitioners submitted their punitive damages claim to the arbitrators voluntarily, openly and without reservation, *see* Complaint ¶ 22 and ad damnum clause ¶ 2, and tried the claim to the arbitrators. Also, the punitive damages claim was clearly within the terms of the submission, under both the arbitration agreement between Sargent and PaineWebber and the Complaint. *See French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, *supra* at 906; *Kurt Orban Co. v. Angeles Metal Systems*, *supra* at 740-41; Point 1.A. above. Thus, there can be no ambiguity as to whether the punitive damages claim was considered and decided. It was.[4]

The $46,000 award itself is not ambiguous. It is a fixed, definite sum. There is no condition or contingency to the award, nor any unexplained or unanticipated condition or contingency arising after or out of the award. There is no uncertainty as to who gets what or as to what the District Court was asked to confirm.

A mere failure to state the means by which the arbitrators arrived at this clear and definite award, or to specify precisely which of various theories or claims were successful and to what extent, is not an ambiguity which requires explanation or permits vacatur and remand. *See Siegel v. Titan Indus. Corp.*, *supra* at 893-94; *Refino v. Feuer Transportation, Inc.*,

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[4]Additionally, the award assessed the costs equally against the parties, indicating the arbitrators' view that both sides bore fault for the claimed loss and that excessive damages were not justified. Also, this even split of costs corroborates the Court of Appeals' view that "it seems likely that . . . the arbitrators apportioned blame to both sides . . . ." *Sargent v. Paine Webber, Jackson & Curtis, Inc.*, *supra*, 882 F.2d at 532.

480 F. Supp. 562, 565-66 n.3 (S.D.N.Y. 1979), *aff'd*, 633 F.2d 205 (2d Cir. 1980) (citing *United Steelworkers v. Enterprise Wheel and Car Corp., supra* at 598). Uniformly, it is well established, following *Wilko v. Swan*, that arbitrators may render lump-sum awards without any explanation at all, and the absence of an explanation does not give cause for suspicion or judicial inquiry. *See, e.g., Koch Oil, S.A. v. Transocean Gulf Oil Co., supra* at 554; *Atlanta-Tomberlin, Inc. v. Eastern Board of Cherokee Indians, supra* at 889; *Fairchild & Co. v. Richmond, Fredericksburg and Potomac R. Co., supra* at 1315-16.

B. A Basis For The Award Is Inferrable From The Record.

Petitioners repeatedly and emphatically argue that this Court should grant certiorari to consider whether to vacate and remand the award because there was "no arbitration record whatsoever" or "no arbitration record of any sort." *E.g.*, Petition at 29, 36. But petitioners are wrong on this point. There is a record. The "record" is not limited to, and does not require, the verbatim reproduction of the testimony and other evidence at the hearing. The "record," as *Sobel v. Hertz, Warner & Co., supra* at 1215, and *Tinaway v. Merrill Lynch & Co., supra* at 225-26, indicate, can be the written submissions of the parties, including the complaint (or, as it is known in arbitration, the statement of the claim). That record exists in this case, and it is from that record that the Court of Appeals found a ready, plausible basis for the award. *Sargent v. Paine Webber, Jackson & Curtis, Inc., supra*, 882 F.2d at 553.

In fact, one need look no further than Sargent's own Complaint to the NYSE to find ample grounds for the award. Sargent maintained that he decided on the "cost averaging plan" to recoup already existing losses, that he informed

PaineWebber of the plan and that he instructed PaineWebber on particular executions within that cost averaging plan. Complaint ¶¶ 12-13. His particular complaint was that on five discrete occasions (mid-September, October 20, November 25 and December 14, 1983 and January 1984), over a five-month period, PaineWebber negligently failed to comply with Sargent's directions. *Id.* ¶¶ 14-18, 20. During these five months, Sargent rode the market, all the while receiving notice of PaineWebber's alleged failures. It is entirely possible, and indeed likely, as the Court of Appeals found, that the arbitrators found shared responsibility and apportioned blame. Furthermore, it is also quite possible, on the basis of Sargent's own pleading, that the arbitrators placed limitations on claimed losses due to ratification or acceptance by Sargent and his continuation of his cost averaging plan.

The record of the case also contains PaineWebber's answer and defenses. It is clear from this pleading that PaineWebber presented defenses of the fault and contributory fault of Sargent and of Sargent's awareness, authorization and ratification of the actions complained of.

From this record the arbitrators may have concluded, permissibly, properly and in accordance with law, that PaineWebber was not entirely responsible for Sargent's claimed losses, that Sargent bore substantial responsibility for the losses or that Sargent's actual losses, regardless of responsibility, were substantially less than the amount claimed. *See Tinaway v. Merrill Lynch & Co., supra* at 225-26.

What petitioners really decry is not the general lack of a record from which a basis for the award may be gleaned, but the absence of a verbatim transcript. That absence, however, is petitioners' fault, as well as a consequence of the speed and thrift of the arbitration process. NYSE Arbitration Rule 624, captioned "Record of Proceedings," provides:

> Unless requested by the arbitrators or a party or parties to a dispute, no record of an arbitration shall be kept. If a record is kept, it shall be a verbatim record. If a party or parties to a dispute elect to have the record transcribed, the cost of such transcription shall be borne by the party or parties making the request.

No formal verbatim record was kept because Sargent did not request one. Having bypassed the right to a verbatim record (and later transcription if desired), it is not now Sargent's prerogative to rely on the absence of a formal, verbatim record as grounds to vacate and remand the award. *See* Point 1.C. above.

3. The Petition Should Be Denied Because (A) There Is No Conflict Between Or Among The Circuit Courts Of Appeals; And (B) Certiorari Would Upset Long-Standing Federal Policy Favoring Arbitration And Contravene The Principles Of Speed And Thrift Underlying That Federal Policy.

A. There Is No Conflict Between or Among The Circuit Courts of Appeals.

Petitioners paint the decision below as conflicting with other federal court decisions:

> The Columbia Circuit is alone, and is in conflict with five other circuits, in holding that a lump-sum award is immune from all judicial remand for explanation of how damages were computed where there is no arbitration record of any sort from which support for or understanding of the award may be gleaned, absent probability of manifest disregard of the law appearing from the (non-existent) record or failure of facts to support it.

Petition at 36. This portrayal of the Court of Appeals' decision is imprecise and inaccurate and in truth, there is no conflict.

The Court of Appeals expressly followed precedent from this Court and from the Court of Appeals for the Second Circuit in reaching its decision. Following *Wilko v. Swan*, the Court of Appeals acknowledged that arbitral awards may be made without explanation. 882 F.2d at 532. Following *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court of Appeals found that the requirement of an explanation for arbitration awards would unjustifiably undermine the speed and thrift manifested by the federal policy favoring arbitration. *Id.* Following *Sobel v. Hertz, Warner & Co.*, *Koch Oil, S.A. v. Transocean Gulf Oil Co.* and *Siegel v. Titan Indus. Corp.*, the Court of Appeals held that lump-sum awards could not be rejected for want of an explanation in the absence of an indication of probable error justifying vacation of the award. *Id.* at 532, 533. Following *Sobel* and *Koch Oil, S.A.*, the Court of Appeals found that a lump-sum award could not be vacated if grounds for it could be gleaned from the record and that the necessary gleaning was normally possible as long as the record disclosed a permissible route to the stated conclusion. *Id.* at 532.

Thusly stating the applicable standards, the Court of Appeals was wholly in line with every other decision on the subject cited by petitioners and of which respondents are aware.[5]

The Court of Appeals then examined the record, particularly Sargent's Complaint before the NYSE, and found a plausible, permissible "route to the stated conclusion," namely that the

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[5]Though unstated in the decision, the Court of Appeals also was in complete harmony with a prior decision of its own, *Hale v. Friedman*, 281 F.2d 635 (D.C. Cir. 1960).

facts indicated the likelihood of shared fault and the award reflected this likelihood. The Court of Appeals also found that there was no ambiguity as to the meaning of the award, with petitioners' suggestion that the panel may not have decided the punitive damages claim "utterly fanciful" in the face of petitioners' own facts as alleged in the Complaint and the plain words of the "full and final" award. *Id.* at 532-33.

In all but three cases cited by petitioners, remand was denied, consistent with the Court of Appeals' decision below. In the remaining three cases, an award was remanded but not for "a full explanation of the manner in which damages were computed," as the District Court here ordered. *Sargent v. Paine Webber, Jackson & Curtis, Inc., supra*, 687 F. Supp. at 11 and 674 F. Supp. at 923. Rather, remands were necessary to clarify or complete the award, so that the District Court could determine what to enforce and how to enforce it.

In *Olympia & York Florida Equity Corp. v. Gould*, 776 F.2d 42 (2d Cir. 1985), the award failed to deal completely with a material contingency to the award, created by the arbitrators. When the contingency failed, the reviewing court could only speculate on what to enforce and how to enforce, and so it sought the arbitrators' assistance on a remand as to what they had intended upon the failure of the material contingency. As the Second Circuit stated, the remand "simply provides an expeditious means for dealing with . . . a *casus omissus* in the Award." *Id.* at 45.

In *Galt v. Libbey-Owens-Ford Glass Co.*, 397 F.2d 439 (7th Cir.), *cert. denied*, 393 U.S. 925 (1968), the District Court was unable to discern from the award or the record if the arbitrators had considered whether a material payment clause had been subject to arbitration under the arbitration agreement. The District Court asked this question of the arbitrators, who responded that the payment clause had not been within

the purview of the arbitration agreement. With this response, the District Court confirmed the award, leaving the nonarbitrable issue for judicial resolution. This decision was affirmed by the Court of Appeals. 397 F.2d at 441-42, 443.

In *Shearson Loeb Rhoades, Inc. v. Much*, C.A. No. 81-4225 (N.D. Ill. Jan. 3, 1983) (unreported), *appeal dismissed*, 754 F.2d 773 (7th Cir. 1985), the District Court enforced the arbitrator's finding of liability but remanded for a recalculation of damages because the original award was not based on anything in the record but rather on "'sheer speculation.'" 754 F.2d at 775. The Court of Appeals did not reach the merits of the appeal. However, in *Galt* the Seventh Circuit had set out as a general standard for judicial review that questions of arbitrability "will not be disturbed if there is any basis therefor," 397 F.2d at 442 (citations omitted). The District Court's inability in *Much* to find any basis in the record for the damages is consistent with this standard, substantially similar to the standard articulated and applied by the Court of Appeals below.

B. Certiorari Would Upset The Long-Standing Federal Policy Favoring Arbitration And Contravene The Principles Of Speed And Thrift Underlying That Policy.

Federal policy favoring arbitration, and particularly favoring the "simplicity, informality, and expedition of arbitration" over "the procedures and opportunity for review of the courtroom," is thoroughly embedded in this Court's decisions on arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra* at 628. *See Shearson/American Express, Inc. v. McMahon, supra* at____, 107 S. Ct. at 2340, and cases cited therein. Courts of Appeals have expressly recognized

and deferred to that policy in their chary approach to judicial invasion of the arbitrators' domain. *See, e.g., Sobel v. Hertz, Warner & Co., supra* at 1215:

> But there is also a public interest manifested in the United States Arbitration Act, 9 U.S.C. § 1 et seq., in the proper functioning of the arbitral process. It would be destructive of that process if we approved the district judge's requirement here that the arbitrators give reasons for their decision.

The Court of Appeals below, following this Court and the Second Circuit, effected that policy in its decision:

> But the absence of a duty to explain is presumably one of the reasons why arbitration should be faster and cheaper than an ordinary lawsuit. We thus agree with the Second Circuit that an explanation requirement would unjustifiably undermine the speed and thrift sought to be obtained by the "federal policy favoring arbitration," *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed.2d 765 (1983).

Sargent v. Paine Webber, Jackson & Curtis, Inc., supra, 882 F.2d at 532.

Granting certiorari to review the arbitration in this case would offend this federal policy. This case presents a commonplace, lump-sum award, based on faultless proceedings and issued in customary form. On its face and in its making, it does not admit of, or even suggest, any error by the arbitrators or disobedience to their duties of full and fair consideration. Petitioners themselves show no error of substance, no error impeaching the fairness of the process, no entrenchment on their rights to present their case or seek recompense. To hold that this award must be reviewed, vacated, remand-

ed and then reviewed again simply because the arbitrators did not explain their reasoning would free no arbitration from this multi-level review, save those awards accompanied by explanations satisfactory to all. Either way, whether explanation is necessitated initially or on remand, and whether new substantive review by the federal courts follows the award directly or indirectly, the purposes of arbitration will be defeated. There will be no more speed, and no more thrift. This would gravely disturb — if not end — the arbitration process. *See Sobel v. Hertz, Warner & Co., supra* at 1215 n.7.

CONCLUSION

For the foregoing reasons, respondents PaineWebber Incorporated and Kevin Greenan respectfully urge this Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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DATED: February 22, 1990

BEFORE THE ARBITRATION COMMITTEE OF THE NEW YORK STOCK EXCHANGE CORPORATION

ERNEST E. SARGENT
4711 Sargent Road N.E.
Washington, D.C. 20017

and

CYNTHIA L. SARGENT
140 35th Street N.E.
Washington, D.C. 20019

Claimants

v.

PAINE WEBBER JACKSON & CURTIS INC.
1120 20th Street N.W.
Washington, D.C.

and

KEVIN GREENAN
c/o PAINE WEBBER
1120 20th Street N.W.
Washington, D.C.

and

BRUCE EDGINGTON
c/o Johnston Lemon & Co., Inc.
Atrium Building
Alexandria, Virginia

and

C. JORDAN BALL
c/o PAINE WEBBER
1120 20th Street N.W.
Washington, D.C.

and

JOAN DOYLE
c/o PAINE WEBBER
1120 20th Street N.W.
Washington, D.C.

Respondents

CLAIM FOR NEGLIGENT MANAGEMENT OF INVESTMENT ACCOUNT, BREACH OF FIDUCIARY DUTY AND BREACH OF CONTRACT

I. **Nature of Claim**

1. This claim is based on the respondents' negligent mismanagement of the claimants' investment account and their failure to execute orders to sell and purchase stock as directed by claimants.

II. **Arbitration**

2. The parties to this claim agreed to Arbitration before the New York Stock Exchange pursuant to written agreements signed by the parties.

III. Parties

3. Claimants, Ernest E. Sargent and Cynthia L. Sargent, are residents of the District of Columbia and were owners of certain securities managed by the respondents in their capacity as stockbroker for claimants.

4. The respondent, Paine Webber Jackson & Curtis Inc., a corporation, (hereinafter "Paine Webber") is a licensed securities broker with offices in New York, and in many states of the United States, as well as in the District of Columbia. Claimants are advised and believe that said respondent is licensed by the District of Columbia to carry on its business therein. At all times pertinent to this action, Paine Webber was so engaged in the business of acting as broker for its customers in the District of Columbia.

5. Respondent, Kevin Greenan, was, at all times pertinent to this action, employed by respondent Paine Webber as an account executive, and acted as agent for respondent Paine Webber at its place of business in the District of Columbia. Defendant Kevin Greenan may hereinafter be referred to as "Greenan."

6. Respondent, Bruce Edgington, was, at all times pertinent to this action, employed by respondent Paine Webber as an account executive, and acted as agent for respondent Paine Webber at its place of business in the District of Columbia. Defendant Bruce Edgington may hereinafter be referred to as "Edgington."

7. Respondent, Jordan Ball, was, at all times pertinent to this action, employed by respondent Paine Webber and acted as agent for respondent Paine Webber at its place of business in the District of Columbia. Defendant Jordan Ball may hereinafter be referred to as "Ball."

8. Respondent, Joan Doyle, was, at all times pertinent to this action, employed by Paine Webber as an account executive, and acted as agent for Paine Webber at its place of business in the District of Columbia. Respondent Joan Doyle may hereinafter be referred to as "Doyle."

IV. Statement of the Claim.

9. The allegations in paragraphs numbered 1-8 are incorporated herein as if they were literally set forth again.

10. In approximately July of 1983, the claimant Ernest E. Sargent (hereinafter "Sargent") transferred his investment accounts to Paine Webber from two other brokerage houses, after Greenan approached him and solicited his business. Sargent's daughter, Cynthia L. Sargent, was also named on the Paine Webber account as joint tenant with right of survivorship. The Sargents' portfolio at this time included approximately 400 shares of stock and approximately eight put and call options thereon in Coleco Industries (hereinafter "Coleco") as well as assorted other investments.

11. At all times pertinent to this claim, the respondents were acting as the claimants' duly appointed agent for the purpose of conducting sales and purchases of corporate stocks and put and call options thereon on behalf of claimants. The respondents owed the claimants the duty to exercise reasonable care, diligence and judgment on the claimants' behalf.

12. The market value of the Coleco securities had decreased since Sargent purchased them. To avoid any financial loss, Sargent decided on a "cost averaging plan" by which he would purchase additional shares of Coleco stock at the decreased market price to reduce his average cost basis in all of his Coleco stock. When the average cost basis of the

Coleco stock was equal or close to the market value, Sargent planned to sell all of that stock thereby eliminating or reducing any financial loss.

13. In approximately September of 1983, Sargent informed Greenan of his cost averaging plan. Sargent informed Greenan that he was inexperienced in the options market and would rely on Greenan's expertise for options dealings. Greenan responded that he understood Sargent's cost averaging plan, would manage the Coleco options accordingly, and would trade the stock as directed by Sargent.

14. By mid-September 1983, Sargent had reduced the average cost of his Coleco stock to approximately the then prevailing market value. Sargent instructed Greenan to sell all his Coleco stock if the market price dropped as much as one-half point. Greenan said he understood, would watch the daily market and sell if there was any drop. In violation of his duty to claimants, Greenan failed to exercise due care or diligence in monitoring Sargent's account and failed to sell the Coleco stock as directed by Sargent even though the Coleco stock dropped about five points during the following week.

15. On October 18, 1983, in furtherance of his cost averaging plan (which had to be put into action again because of Greenan's failure to sell the claimants' stock and thus eliminate any loss to claimants as alleged in paragraph 17 above [*sic*]), Sargent, through Greenan, purchased 1,000 shares of Coleco stock for $28,184.71, including commission.

16. In October of 1983, in violation of his duty to claimants, Greenan negligently failed to advise Sargent that certain option contracts for Coleco stock would be exercised against Sargent on or about October 20, 1984. As a result, Sargent was unable to anticipate and avoid this contingency and was forced to purchase 400 shares of Coleco stock at ap-

proximately $16.00 a share above the prevailing market price, for a total of $18,296.50 including commission.

17. On November 25, 1983, in continued furtherance of his cost averaging plan (which had been put into action again because of Greenan's failure to sell the claimants' stock and thus eliminate any loss to the claimants as alleged in paragraphs 17 and above [*sic*]), Sargent directed Edgington to purchase 3,000 shares of Coleco stock at the current market price of $18.75 a share for a total of $56,250, excluding commission. Edgington, who was acting for the vacationing Greenan, refused without just cause or reason in violation of the respondents' duty as claimants' agent to execute the purchase order on Sargent's behalf although Sargent had the money in his account for the transaction. As a direct result of Edgington's refusal to act, Sargent's cost averaging plan was thwarted because he was unable to reduce his average cost basis when the market price of Coleco stock was low. He was then unable to take advantage of the subsequent rise in the price of Coleco stock before Christmas 1983 to sell his Coleco stock with little or no loss, because he had not been allowed to adequately reduce his average cost basis.

18. On November 28, 1983, Jordan Ball assigned Doyle to replace Greenan as Sargent's individual account executive. On December 14, 1983, Doyle failed to exercise her duty of reasonable care and judgment and (contrary to Sargent's investment objectives because the market price had risen) purchased an additional 2,500 shares of Coleco at $25.00 a share for a total of $62,990.26 including commission.

19. In violation of its duty to claimants, Paine Webber acting through Ball, failed and neglected to exercise proper supervision and control over subordinate account executives by allowing them to neglect their duties to claimants.

20. In January of 1984, Sargent instructed Doyle to sell the Coleco options as soon as possible. Doyle negligently failed to sell those options in a prompt and efficient manner, despite the fact that the market price continued to drop.

21. As a direct result of the aforesaid actions, the claimants lost at least $300,000, in Coleco stocks and put and call options thereon, calculated as the difference between the sum advanced by claimants for the purchase of said securities and the sum received by them upon the final sale of said securities, including brokerage commissions, plus interest. The exact amount of claimants loss has not as yet been definitely ascertained.

22. The negligence of respondents was gross and wanton and claimants should recover therefore punitive damages in the sum of $500,000 in addition to their compensatory damages in this action.

WHEREFORE, the premises considered, claimants demand:

1. That an award be rendered in favor of claimants against all respondents, jointly and severally, in the amount of Three Hundred Thousand Dollars ($300,000) as compensatory damages or such larger amount as shall be proved;

2. That an award be rendered in favor of claimants against all respondents, jointly and severally, for the sum of Five Hundred Thousand Dollars ($500,000) as punitive damages;

3. That claimants be awarded their arbitration costs, expenses and attorneys fees; and

4. That the costs of the arbitration be borne by respondents, jointly and severally.

5. For such other and further relief as this arbitration committee deems just and proper.

Respectfully submitted,

REUSS HERNDON McCONVILLE & KING

By: _____

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NEW YORK STOCK EXCHANGE RULES

Rule 607. Designation of Number of Arbitrators

(a)(1) Except as otherwise provided in this Code in all arbitration matters involving public customers and other non-members where the matter in controversy does not exceed the amount of $500,000, or where the matter in controversy does not involve or disclose a money claim, the Arbitration Director shall appoint an arbitration panel which shall consist of no less than three (3) nor more than five (5) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer or non-member requests a panel consisting of at least a majority from the securities industry.

(2) In all arbitration matters involving public customers and other non-members where the amount in controversy is $500,000 or more, the Director of Arbitration shall appoint an arbitration panel which shall consist of five (5) arbitrators unless the parties agree in writing to a panel of three (3) arbitrators, at least a majority of whom shall not be from the securities industry, unless the public customer or non-member requests a panel consisting of at least a majority from the securities industry.

Rule 622. Interpretation of Code

The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code which interpretation shall be final and binding upon the parties.

Rule 624. Record of Proceedings

Unless requested by the arbitrators or a party or parties to a dispute, no record of an arbitration shall be kept. If a

record is kept, it shall be a verbatim record. If a party or parties to a dispute elect to have the record transcribed, the cost of such transcription shall be borne by the party or parties making the request.